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TRANSCRIPT OF RECORD.

131-191.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 286. 47 4 2

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

UNITED STATES EX REL: MYRA CLARK GAINES.

No. 287. 43 5 3

THE CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

vs.

UNITED STATES EX REL: MYRA CLARK GAINES.

APPEAL AND WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED SEPTEMBER 18, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 286.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

THE UNITED STATES EX REL: MYRA CLARK GAINES.

No. 287.

THE CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES EX REL: MYRA CLARK GAINES.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Caption	1	1
Petition for mandamus	1	1
Order "	7	3
Motion to quash petition	8	3
Order denying motion to quash	11	4
Answer	12	4
Document—List of judgments against the City of New Orleans registered at the comptroller's office	24	9
—Ordinance to levy city expense and debt tax for year 1883	36	17
—Ordinance adopting an estimate of the revenues of the City of New Orleans for year 1883	38	17

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Hearing and submission of motion for mandamus	45	22
Bill of exceptions	46	22
Record of case of Gaines *vs.* City of New Orleans, No. 8825	48	22
Bill of complaint	48	23
Amended Bill	90	37
Answer to bill	100	40
Answer to amended bill	139	53
Replication	142	54
Opinion	143½	54
Decree	144	74
Writ of *fieri facias*	146	75
Garnishment proceedings, &c.	149	76
Petition and interrogatories to garnishees	149	76
Order on petition	154	77
Citation to Louisiana National Bank	156	78
Marshal's return	157	78
Citation to New Orleans National Bank	158	78
Marshal's return	159	79
Citation to B. T. Walshe as treasurer, &c.	160	79
Marshal's return	161	80
Citation to W. J. Behaus as mayor, &c.	162	80
Marshal's return	163	81
Answer of New Orleans National Bank	164	81
W. J. Behaus, mayor, &c.	164	81
B. T. Walshe, treasurer, &c.	166	82
Louisiana National Bank	171	84
Exhibit A—Compromise, &c., between City of N. O. and L. & N. R. R. Co. and N. O. M. & T. R. R. Co.	180	87
B—Plan or diagram	185	88
C—Opinion of Mr. Chief Justice Waite in case of City of N. O. *vs.* N. O. T. & M. R. R. Co., No. 17, O. T., 1882	185	88
D—Proceedings of city council	187	89
Rule to set aside answers of Louisiana National Bank and Walshe	188	89
Petition of intervention of Mrs. Sarah M. King	189	90
Answer to petition of intervention	193	91
Motion to quash execution, &c.	193	91
Bill of exceptions on traverse to answers	203	95
Testimony of J. H. Oglesby	208	97
Bill of exceptions on motion to quash execution	212	98
Fi. fa. in case of Young *vs.* City of New Orleans	214	99
Opinion	218	100
Decree	240	108
Writ of mandamus	346	110
Marshal's return	251	111
Motion and order for appeal	253	112
writ of error	255	113
Opinion on application to fix amount of bond	257	114
Stipulation as to bond	260	115
Bond for appeal	261	115

	Original.	Print.
Bond for writ of error	265	117
Stipulation as to transcript	268	120
Certificate to transcript	271	120
Citation on appeal	272	121
Service of citation	273	121
Writ of error	274	122
Citation on writ of error	276	123
Service of citation	277	123
Assignment of errors	278	124

1 *Petition for Mandamus. Filed June 6th*, 1883.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

UNITED STATES *ex rel.* MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 10316.

To the honorable the judges of the circuit court of the United States for the fifth judicial circuit, eastern district of Louisiana:

The petition of the United States of America on the relation of Myra Clark Gaines, a citizen of the State of New York, residing at Brooklyn, shows that the City of New Orleans, a corporation of and within the State of Louisiana, under the statutes of Louisiana, is indebted to your petitioner, according to a judgment and decree rendered in this court in favor of your petitioner, for the sum of one million nine hundred and twenty-five thousand six hundred and sixty-seven $\frac{83}{100}$ dollars ($1,925,667.83), with five per cent.
2 interest per annum on the sum of nine hundred and fifty thousand one hundred and ten dollars ($950,110) from the 10th January, 1881, until paid, and in the further sum of thirty-four thousand dollars ($34,000) costs, with five per cent. interest per annum thereon from 10th January, 1881, until paid, and costs of suit, against the City of New Orleans, in the suit in equity No. 8825 of this court, which is specially referred to and made a part of this petition to be used on the trial hereof and, the record of which is in this court in the suit aforesaid.

Your petitioner says that this judgment and decree is in full force and effect and is final and executive and is a valid charge upon the city aforesaid.

Your petitioner shows that the cause of the judgment and decree consisted of an implied contract made by the City of New Orleans with your petitioner in the month of ——, 1834, when it entered into the possession of certain property known as a partner of the "Blanc tract" in the said City of New Orleans, to pay to your peti-
3 tioner the fruits, rents, and revenues which might have been gathered therefrom had your petitioner not been hindred and prevented from getting the possession of her said premises by said City of New Orleans and its successors.

That by the act No. 71, of the Pamplet acts of 1852 of the State of Louisiana, the said City of New Orleans assumed the payment of said obligation to your petitioner and became liable therefor.

Your petitioner states that no part of the judgment or decree has been paid; that the said judgment has been duly registered with the comptroller of the City of New Orleans, and that a writ of *fieri facias* has issued from this hon. court and been placed in the hands of the United States marshal in and for this district, and a demand made by said marshal upon the mayor of said city for the payment of said judgment, which was refused; that subsequently a writ of

garnishment was issued against third persons supposed to have property in their possession belonging to the defendant in execu-
4 tion particularly to the extent of forty thousand dollars, and that petitioner is willing and in readiness to have the said writ of mandamus defined and limited to the collection of a tax sufficient to pay what remains of her said judgment after it is credited with what is realized from said writ of garnishment. That the said City of New Orleans has no property other than that above mentioned subject to execution known to your petitioner; that executions similar to hers have been frequently issued in this court and returns thereon made: No property found. That the said city denies its obligation to pay said decree or to collect any tax for the payment of said judgment and decree, or to collect any tax for the payment of the debt of the said city, and will make no effort to pay this debt, and that no money can be made by the ordinary process of this court, as the said city has no property subject to execution, and that said conduct on the part of the said city is wil-ful and mischievous, and is a great wrong to your petitioner.

5 Your petitioner prays that this hon. court, in execution of its process, cause a mandamus to issue to the City of New Orleans, the common council thereof, and each and every member of the same, and to each and every of the said city whose duties relate to the assessment and collection of taxes, directing and requiring them to levy and apportion a tax upon all of the taxable property within the said City of New Orleans, sufficient in amount, after making the same allowance for insolvencies, delinquencies as the law makes for general purposes, to pay said relator or her attorneys of record the amount of judgment recovered by her in this court on the 5th day of May, 1883, in the suit entitled Myra Clark Gaines *vs.* City of New Orleans, No. 8825 on the docket of this court, the sum of one million nine hundred and twenty-five thousand six hundred and sixty-seven $\frac{83}{100}$ dollars, with five per cent. interest per annum on the sum of nine hundred and
6 fifty thousand one hundred and ten dollars from the 10th January, 1881, until paid, and in the further sum of thirty-four thousand dollars costs, with five per cent. interest thereon from the 10th day of January, 1881, until paid, and costs of court in No. 8825, the said City of New Orleans to be credited on the said judgment with the amount realized from the writ of garnishment above mentioned.

Your petitioner prays for a citation to the said City of New Orleans, and for such other and further relief as may be necessary to the execution of the judgment aforesaid by a due assessment upon the taxable property of the said city aforesaid.

(Signed) WM. REED MILLS,
A. GOLDTHWAITE,
J. WARD GURLEY, JR.,
Sols. for Compl't.

THE STATE OF LOUISIANA, *City of New Orleans:*

Myra Clark Gaines, being duly sworn, deposes and says: That all the allegations and facts in the foregoing petition are true and correct.

7 (Signed) MYRA CLARK GAINES.

Sworn to and subscribed before me this sixth day of June, A. D. 1883.

(Signed) ANTHONY SAMBOLA,
U. S. Comm'r, Circuit Court, East. Dist. of La.

Let an alternative writ of mandamus issue herein as prayed for, returnable on Tuesday, the 12th day of June, 1883, at 11 o'clock, a. m.

June 6th, 1883.

(Signed) EDWARD C. BILLINGS, *Judge.*

Received June 6th, 1883, by the U. S. marshal, and on the 7th day of June, 1883, I served a true copy of the within petition for mandamus on the City of New Orleans by handing the same to W. J. Behan, mayor of said city, in person, in the city of New Orleans. June 8, '83.

(Signed) J. R. G. PITKIN,
Marshal, East. District of Louisiana.
By JOS. DEVONSHIRE,
D'y Marshal.

8 *Motion to Quash Petition. Filed June 11th,* 1883.

Circuit Court of the United States, Eastern District of Louisiana.

THE UNITED STATES *ex rel.* MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS. } No. 10316.

Now comes the City of New Orleans, through Chas. F. Buck, city attorney, appearing herein as a corporation through the said attorney *pro hac vice*, for the purpose of this motion only, and moves the court now here that the said Myra Clark Gaines, the relator herein, through her counsel, show cause, if any they have or can show, on Tuesday, the 12th day of June, at 11 o'clock a. m., why the petition herein, the order for the alternative writ of mandamus, & all proceedings herein shall not be quashed, set aside, and held for naught for reasons and causes appearing on the face of said proceedings; that is to say, the following reasons and causes amongst others:

9 1st. That the petition and proceedings herein and all matters therein stated and shown, do not show or disclose any right to relief prayed for, or to any writ or order of mandamus, either alternative or peremptory, or to any order for such writ or relief.

2d. That if the relator has or can be entitled to any writ of mandamus to compel any act of legislation on the part of the legislative department of the government of the City of New Orleans, proceed-

ings to that end are and must be addressed to and command each and every member of the council of said city, and that, if otherwise regular, the proceedings herein are, on the face thereof, defective and void, for want of the proper parties respondent.

3d. That the papers, pleadings, and record herein disclose no lawful ground or showing which can in law authorize, warrant, or permit the issue of any writ of mandamus, peremptory or alternative, against the City of New Orleans, or any officer or department of the government thereof, nor any warrant or showing for the order
10 or allowance of any such writ to be laid upon any officer or legislative body forming a branch or department thereof.

4th. That no alternative writ of mandamus has been made, sealed, or served on any officer or department of the government of the City of New Orleans, nor has any rule to show cause why such writ should not be granted and issued been served on any respondent, and there is no writ or paper upon which or to which any respondent can make any return or show any cause or make any issue in any lawful form or manner, or protect its rights in the due and regular order of pleading.

5th. That all of the pleadings, orders, and proceedings in this cause are irregular, uncertain, insufficient, informal, defective, void, and bad on the face thereof, and do not relate in any manner to any matters not matter of discretion on the part of the council of the City of New Orleans in the free exercise of its legislative
11 power and will, and not the imperative command or duty imposed by any imperative law.

And it is ordered by the court, that the relator or her counsel be served with this motion, and show cause as moved herein.

Marshal's Return.

Received June 11, 1883, by the U. S. marshal, and on the same day, month, and year I did serve a true copy of the within rule to quash petition for alternative mandamus on Mrs. Myra C. Gaines by handing the same to W. R. Mills, Esq., her attorney of record, in person, and leaving the same with him.

Ret'd same day.

(Signed) J. R. G. PITKIN,
U. S. Marshal, E. Dist. of La.,
By E. S. WURZBURGER, *Deputy.*

Order on Motion to Quash.

Extract from the Minutes. April Term, 1883.

NEW ORLEANS, *Tuesday, June* 12, 1883.

12 Court met pursuant to adjournment. Present: Hon Edward C. Billings, district judge.

U. S. *ex rel.* MYRA C. GAINES
vs.
CITY OF NEW ORLEANS. } No. 10316.

This cause came on to be heard on the motion made by the de-

fendant on yesterday to quash the petition herein, the order for alternatives, writ of mandamus, and all proceedings herein, and was argued by counsel.

On consideration whereof it is ordered, that the motion be refused, and that part of said motion which refers to the insufficiency of the allegations of the petition be referred to the return.

Answer of the City of New Orleans. Filed June 12th, 1883.

U. S. Circuit Court.

THE U. S. *ex rel.* MYRA C. GAINES
vs.
CITY OF NEW ORLEANS. } No. 10316.

Now comes The City of New Orleans, and for exception
13 answer and return to the petition herein filed, reserving the motion to quash, and dismiss on the face of the papers, and making same part of this return, answers and says:

That the relator had no right to issue execution on her judgment, because, within ten days after its rendition, this respondent, the City of New Orleans, applied by motion for an appeal from said judgment to the Supreme Court of the United States to operate as a supersedeas, which motion was granted, and the bond for supersedeas fixed; that having made said application, and said appeal having been granted, this respondent had sixty days from the rendition of said judgment to furnish said bond for the supersedeas; that said delay does not expire until the 13th July, 1883, and no execution can lawfully issue before the expiration thereof, and the execution of the relator was issued before said delay had expired.

That even if the said execution had not been stayed and
14 suspended as it was by said application for the appeal, the plaintiff having issued said execution, which is now in the hands of the marshal, the plaintiff can have no relief by mandamus, which in no case can be granted until the writ of execution is returned unsatisfied and all other remedies to obtain satisfaction are exhausted.

That the legislative power of the City of New Orleans is vested in the common council, not in the mayor, or any other officer, but solely in said council, and any mandamus to compel the levy of a tax must be directed to the said council and the members thereof, hence no relief can be awarded in this proceeding because the council is not a party to this proceeding.

That this proceeding is illegal, because there is neither exhibited a rule to show cause why the writ of mandamus should not issue, nor has there been issued any alternative writ, hence there is no issue formed on which any adjudication can be made.

15 That the petition of the relator shows no cause or basis basis for the issue of the writ of mandamus claimed by the relator, and none of the conditions exist to authorize said writ.

That there is no — to authorize the tax claimed by the relator, no mandamus can issue to enforce any tax not directed by law to

be imposed, and not only is there no law to warrant said tax, but the law prohibits any such tax to be imposed.

That the power of taxation possessed by the City of New Orleans is limited; that the said limit imposed by the act of the Legislature of Louisiana of 1876, No. 31, of the session acts of 1876, was one and one-half per centum on the dollar of all the assessed values liable to be taxed, which said limitations was, by said act, declared to be a contract with the bond creditors of said city and with the taxpayers; that by the constitution of the State, adopted in December, 1879, and now in force, the limitation upon the taxing power of the city is one per centum upon the dollar of the assessed valuation
16 of all the property of the city subject to taxation, which limitation is expressed in said instrument as follows, to wit:

"No parish or municipal tax for all purposes whatsoever shall exceed ten mills on the dollar of valuation."

Constitution of 1879, Art. 209.

And under said act of eighteen hundred and seventy-six, five mills of the tax therein authorized was for the bonded debt of the city, all of which more fully appears by the said act and by article 209 of the constitution of the State, specially referred to for fuller explanation and greater certainty.

That under the charter of this city it is required in each year to prepare a budget of expenses for the year which shall exhibit all the items of corporate expenditure, & thereafter shall levy the
17 taxes to pay said corporate expenses; that pursuant to these provisions the council of the city in December, 1882, adopted said budget of expenses and certain amendatory ordinances for the current year, 1883, all of which more fully appears by the city charter, contained in the act number 20, of the Legislature of 1882, and by copy of said ordinances adopting the budget herewith filed and made part hereof as Exhibit A, being ordinances No. 49, 50, and 100 C. S., which were specially referred to for fuller explanation and greater certainty.

That in accordance with the law the council is now about levying the taxes to provide for the corporate expenses exhibited by said budget, the requisite ordinance for that purpose having been introduced in the council on the 5th day of June, 1883, laid over for one week, as required by said charter, when it will come up to be passed, and copy of said ordinance, marked Exhibit B, is herewith filed as part hereof; that the assessed valuation of all property of this city is, for the year 1883, one hundred and thirteen millions one hundred & thirty thousand two hundred and sixty $\frac{78}{100}$ dollars
18 ($113,130,262.78), as shown by the assessment-rolls of the city, and made part hereof; that the taxes proposed to be levied by the council upon that assessed valuation are as follows, that is to say:

One per centum upon the dollar for the police, the lighting of the city, the public schools, court-houses, salary of officers, and others necessary of the city government.

Five mills or one-half of one per centum for the bonded debt of

the city, existing in the form of premium bond, being the tax provided exclusively for that form of the bonded indebtedness by said act of 1876.

Five mills or $\frac{1}{2}$ of one per centum for the bonded debt of this city other than premium bonds, being the tax provided exclusively for the said debt by the act of No. 58 of 1882, specially referred to for further explanation and further certainty, the courts having decided that the limitations in the constitution of 1879 had no application to the taxation for said bonded debt, which antidated said limitations.

And, further answering, this respondent shows that said
19 tax of ten mills for the police, lights, schools, court-houses, salaries of officers, and other expenses of the government levied upon said assessed valuation of one hundred and thirteen millions will barely suffice, with all other sources of revenue at the command of the city, to provide for the wants of the government incident and absolutely essential to its existence that the law requires in framing the budget; that 25, twenty-five, per cent. or one-fourth of the estimated receipt or total revenue shall be set apart for public improvements, and the city is confined for her alimony to 75% of her revenues.

And this respondent further shows that said taxation for the bonded debt, levied upon the same assessed valuation, is all of it absolutely required to pay the interest, principal, allotments of premiums, bonds, and premiums required to be paid for the current year for and on account of said bonded debt and out of the taxes of the year.

And respondent shows that the said tax of ten mills for
20 the essential expenses or the alimony of the city government and said taxes for the bonded debt are all the taxes which the City of New Orleans is authorized or permitted to levy under the limitations aforesaid, imposed by the constitution and laws; that the full measure of the taxing power possessed by the city will have been exerted and exhausted when said taxes will have been imposed, and there is no law whatever to authorize the tax by the relator demanded, but, on the contrary, said tax by her claimed is prohibited.

Further answering, this respondent shows that the laws of Louisiana prescribe the mode by which payment of judgments against the city is to be enforced; the judgment is to be registered in the office of the comptroller, and to be paid in the order of registration; that the fund provided for that payment is such amount as the common council can set apart from and out of the annual revenues of the year, to be thus set apart and designated in the
21 annual budget, to which fund the judgment creditors are restricted, and payment from which is to be awaited by them, in the order of registry, all of which more fully appears by said act prescribing such mode of payment, being act No. 5 of the Legislature of Louisiana of 1870, and is specially referred to for fuller explanation and greater certainty.

Respondent shows that the relator has availed herself of that act, registered her judgment, and that the amount of judgments registered before that of the relator, and entitled to priority of payment over her, is in excess of five hundred thousand dollars, as per Exhibit D, made part hereof; that the appropriation in the said budget of 1883, to pay all said registered judgments, is five thousand dollars; that the relator is confined to said mode of obtaining payment; must await her turn for satisfaction from such fund, and from such other appropriations as under said act of 1870, may here-
22 after be made; has no right to any relief other than such act affords; and to award her the tax she claims would not only be without legal warrant, but would give her an entire preference over all other judgment creditors of the city awaiting payment on said registry.

Respondent denies that the relator is, or ever was, a contract creditor of this city, express or implied, or that the city ever had any relation whatever with the relator from or out of which there could arise or exist any contract, express or implied; but the judgment on which the relator founds her claims decrees the sum therein awarded to her upon the ground that the city has commited a tort or wrongful act which the judgment determines has been a continuing wrong from 18— to the present; and this respondent shows that judgment creditors of that class are wholly dependant upon the legislative discretion, and confined to such provisions as the Legislature makes for them, which is contained in said act of
23 1870, binding on all judment creditors of the class of relator.

Wherefore this respondent prays that there be judgment in its favor, dismissing relator's petition and for general relief.

(Signed) C. F. BUCK, *City Att'y.*
H. C. MILLER &
J. R. BECKWITH,
Of Counsel.

W. J. Behan, duly sworn, deposes and says: That he is mayor of the City of New Orleans, and that all the matters of fact in the foregoing answer and return contained are true and correct to the best of his knowledge and belief.

(Signed) W. J. BEHAN.

Subscribed and sworn to this 12th day of June, 1883, before me.

(Signed) J. A. CHARBONNET,
Comm'r U. S. Circuit Court, Eastern District of Louisiana.

24 *Document Filed with Answer June 12th, 1883.*

List of judgments against the City of New Orleans registered at the comptroller's office.

Judgment creditor.	Date of registry.	Amount.
Jno. H. Keller	Aug. 2, 1875	5,466
Jno. Moylan, transferree	Dec. 16, "	12
" " "	" "	83 70
" " "	" "	100
" " "	" "	100
" " "	" "	100
" " "	" "	100
" " "	" "	97
" " "	" "	100
" " "	" "	96
" " "	" "	98 75
A. Guilfoux & L. E. Lee	Jan'y 15, 1876	2,000
N. Connell	" 26, "	9,862 29
N. B. Hutton	M'ch 17, "	38
R. B. Baquil	" "	34 50
Rufus Waples	July 7, "	2,820
Lawrence Casey	" 8, "	58 37½
Jno. Klein	Aug. 21, "	89,000
Potter & Andreus	Sept. 12, "	9,001 68
Jos. Alexander	Nov. 8, "	138
W. Bailey & My. Aldrich	20, "	1,200
F. J. Herron	May 4, 1877	2,420
J. O. Landry	July 7, "	700
Fossene Bros.	" 15, "	26,858
25 Elizabeth McKay	Sept. 31, 1877	489
Chas. Boisblanc	Aug. 23, "	500
Carsen Mudge	Oct. 4, "	6,700
And. C. Lewis	Nov. 8, "	1,790 30
J. B. Cotton & *als.*, ex.	Feb'y 26, 1878	2,500
Wid. Maria Dume	Ap'l 30, "	80
Jos. L. Herwig	May 27, "	5,000
Philip F. Herwig	" 28, "	8,000
Ovide C. Blandin	" 29, "	2,000
Wm. J. Behan	June 5, "	70,550 56
L. F. Barrett	June 15, "	99 25
" " "	" "	99 50
" " "	" "	100
" " "	" "	99 50
" " "	" "	95
" " "	" "	99 75
" " "	" "	99
Dr. Jas. F. Finney, Alf Marchand & Wm. Henry, int.	July 5, "	19,670

	Judgment creditor.	Date of registry.	Amount.
	Christian Gokenbach	Aug. 4,	2,500
	F. K. Condran	" 8,	375
	W. Jones	" 8,	442 50
	M. Burk	" 8,	300
	" Gleason	" 8,	315
	Jos. Balter	" 11,	366 98
	Thos. Quilter	" 11,	428 03
	A. O. Marquez	Sept. 10,	477
	N. O. Gas-Light Co.	Oct. 24,	113,368 85
	Frank Condran	" 29,	45
	L. F. Barrett	Nov. 30,	5,074 16½
26	Alfred Rosseau, exe.	Dec. 10, 1878	2,534 50
	Wm. O. Neill	" 12, "	1,000
	Jules Cassard	" 13, "	2,000
	Jean M. Saux	" 22, "	420
	P. Montegut	" 23, "	50
	Peter Faska	Jan'y 3, 1879	84 69
	" "	" "	65 57
	M. A. Southworth	" 30, "	3,474 66
	Hubert Wax	Feb'y 3, "	77 25
	" "	" "	76 50
	R. L. Belden & R. S. Pennell	" 5, "	100
	G. Del Corral	" 27, "	2,451 04
	Amoskeag Man'f't'g Co.	M'ch 6, "	28,459 41
	Gubernator & Terry	" 27, "	2,089 94
	W. Nieman	April 15, "	53 50
	A. Dumestre	" 16, "	150
	Jas. Garner	" 24, "	91 80
	Rebecca W. Wolf	May 2, "	540
	And. J. Bacon	" 7, "	3,217 02
	Jno. Fitzpatrick	Aug. 27, "	29,179 75
	A. Jacquet	" 29, "	56 65
	Jean Luc	" "	77 25
	" "	" "	51 50
	" "	" "	91 80
	Pierre Dejean	" "	52 69
	Jos. Royes	" "	38 62
	" "	" "	91 80
	Bertrand Dupont	" "	77 25
	L. Beney	" "	70 60
	" "	" "	82 40
	Jean Carriere	" "	76 50
27	Jean Carriere	" "	77 25
	L. O. Chastant	" "	85
	L. O. Chastant	" "	79
	"	" "	75 50
	Wm. Naber	" "	91 80
	"	" "	77 25
	J. Fernandez	" "	77 25
	"	" "	91 80

Judgment creditor.	Date of registry.	Amount.
J. Moledous	Aug. 29, 1879	91 80
E. Champon	" "	91 80
"	" "	77 25
Mrs. J. Mallett	" "	61 65
"	" "	82 40
F. Miquet	" "	76 50
"	" "	77 25
Dr. J. J. Hays	Oct. 5, "	5,000 60
John Fulton	Dec. 13, "	1,089
Chas. Martinez	" "	1,335
Aug. M. Moullin	" "	2,040
A. Brugier	Dec. 15, "	91 80
"	" "	15 30
"	" "	77 25
"	" "	72 10
Fred. Neiy	Jan'y 3d, 1880	91 80
"	" "	10 20
"	" "	25 85
Jean Lopez	" "	76 50
J. B. Bertonneau	March 20, "	77 75
"	" "	76 50
Valentine Usner	" "	77 25
Paul Berge	" "	77 25
28 Jas. C. Williams	" "	77 35
Manuel Lerogo	Ap'l 15, "	76 50
Joseph Kammer	" "	76 50
Fred. Roth	" "	76
John Loustaman	" "	76 50
S. Gomez	" "	91 80
J. Loustaman	" "	76 50
Peter Commander	" "	76 25
Geo. Foster	" "	76 25
Jules Mossy	" "	51
J. Schwab	" "	76 50
A. B. Reading, for the use	May 17, "	700 80
Wid. A. Peyregne	July 30, "	77 25
Simon Reims	" "	76 50
Geo. Auer	" "	77 25
G. Mulho	" "	91 80
"	" "	77 25
"	" "	77 25
J. B. Casanova	" "	76 50
"	" "	77 25
Jno. A. Raparlie	Aug. 6, "	76 50
Claude Carteret	" "	76 50
Geo. E. Gray	Sept. 20, "	61 80
"	" "	56 65
"	" "	82 40
E. Counnagere	Sept. 28, "	51
Henry Stork	" "	76 50

	Judgment creditor.	Date of registry.	Amount.
	Jacob Epser	Oct. 14, 1880	91 80
	"	" "	77 25
	Jacob Epser	" "	70 25
29	Chas. Bennett	Nov. 15, 1880	76 50
	Thos. Jorda	" "	75 50
	B. Lamanda	" "	76 50
	Ignatz Holum	Nov. 19, "	91 80
	" "	" "	91 80
	" Haber	" "	51 80
	H. Heideman	Dec. 2, "	76 50
	"	" "	77
	Jacob Goebel	Dec. 3, "	76 50
	G. Larousse	" "	76 50
	Wid. John A. Meyers	" "	76 50
	Mrs. Foster	" "	38 62½
	V. Weber	Dec. 4, "	76 50
	G. Moulaier	" "	76 50
	G. Weiss	" "	76 25
	Jos. Figarolo	" "	77 25
	Geo. Kaiser	" "	91 80
	" "	" "	77 25
	" "	" "	32 40
	" "	" "	84 98
	Morris Ranger	" "	13,000 00
	" "	" "	157,000
	Fred. Heckie	Jan'y 3, 1881	77 25
	" "	" "	76 50
	" "	" "	77 25
	Phil. Ryan	" "	77 25
	" "	" "	77 25
	A. C. Prevost	" "	76 50
	L. Ackerman	" "	91 80
	M. J. Schwann	Jan'y 21, "	77 25
	" "	" "	76 50
	J. Younger	" "	77 25
30	J. Younger	Jan'y 21, 1881	91 80
	Fred. Gosling	" "	51 50
	Fred. Gosling	" "	77 25
	H. F. Sturcken	Jan'y 25, "	3,029 75
	Wid. Jas. Griffen	" 26, "	91 80
	Mrs. A. Grosskopp	" 26, "	91 80
	Pierre Carny	" "	76 00
	G. T. Baumann	" "	91 80
	Adam Zims	Feb'y 7, "	100 50
	C. I. Fox	" "	76 50
	Andrew Witt	" "	77 25
	Christian Klung	" "	77 25
	" "	" "	75

	Judgment creditor.	Date of registry.	Amount.
	Henry Singer	M'ch 2, 1881.	77 25
	" "	" "	91 80
	" "	" "	77 25
	Joseph Schoener	" "	76 50
	" "	" "	77 25
	Chas. Ferrell	" "	91 80
	H. C. Summons	M'ch 16, "	91 80
	" "	" "	77 25
	Jno. Schroeder	" "	76 50
	" "	" "	77 25
	F. Oldendorf	M'ch 21, "	77 25
	F. Leidheimer	" "	91
	Jos. Pabst	" "	100
	Elizabeth Dupert	" "	77 25
	Jean Fareau	" "	72
	" "	" "	56 65
	" "	" "	51 50
	C. Schued	" "	76 50
31	Jos. Morug	April 4, 1881.	77 25
	Mary Ellerman	" "	91 80
	Thomas Flemming	" "	77 25
	" "	" "	77
	" "	" "	91 80
	John Burk	" "	76 50
	A. Leonard	April 6, "	77 25
	" "	" "	91 80
	" "	" "	77 25
	" "	" "	77 25
	John Koepler	" "	91 80
	" "	" "	77 25
	" "	" "	77 25
	" "	" "	77 25
	C. Bouck	" "	75 25
	" "	" "	77 25
	" "	Aprii 11, "	76 50
	D. Magner	" "	71 25
	" "	" "	91 80
	" "	" "	77 25
	" "	" "	77 25
	Mrs. M. Foley	" "	77 25
	" " "	" "	77 25
	" " "	April 18, "	91 80
	J. Kampkin	" "	41 10
	Mrs. J. Kohlman	" "	25 50
	M. Schultz	" "	77 25
	C. P. Baldwin	May 5 "	91 80
	Leo. Stegle	" "	77 25
	" "	" "	91 80
	C. Sweeney	" "	38 68

	Judgment creditor.	Date of registry.	Amount.
	C. Sweeney	May 5, 1881.	51 50
32	" "	May 5, 1881.	91 80
	J. Tontenberta	" "	25 50
	J. Tontenberta	" "	76 50
	L. Ackerman	" "	56 65
	" "	" "	56 65
	A. Carranno	" "	76 50
	Emile J. Mandel	" "	51 50
	" " "	" "	91 80
	Jean Wappler	May 16, "	76 50
	T. Haley	" "	91 80
	" "	" "	51 80
	" "	" "	77 25
	M. C. Cullen	" "	77 25
	" " "	" "	77 25
	" " "	" "	91 80
	F. Gunther	May 23, "	91 80
	Peter Hennen	" "	76 50
	M. Martinez	" "	91 80
	B. Brown	" "	76 50
	F. Aufrukolk	May 31, "	76 50
	L. Suberville	" "	76 50
	Lacas Masaraich	" "	76 50
	J. Bormobers	" "	76 50
	John Gross	" "	51
	N. O. Rep. Pr't'g. Co.	June 3, "	6,107
	Henry Spitzfaden	" 6, "	91 80
	" " "	" "	84 98
	L. Marena	" "	91 80
	Henry Pameyer	" "	76 50
	L. S. Jessum	June 14, "	76 50
33	Chas. J. Thihman	June 14, 1881	76 50
	John Silvest	" "	76 50
	P. Follain	June 17, "	77 25
	"	" "	51 50
	"	" "	91 80
	Mrs. Cain	" "	77 25
	"	" "	51 50
	"	June 17, "	25 50
	"	" "	30 90
	Armand Ballasey	" "	56 65
	Henry Menken	" "	76 50
	Armand Ballasey	" "	91 90
	Chas. Deitchman	Aug. 9, "	91 90
	Jules Lanabere	Oct'r 19, "	76 50
	Manuel Frigo	" "	76 50
	"	" "	77 50
	"	" "	77 25
	J. Ruel	" "	30 60
	John Jacobs	" "	76 50

	Judgment creditor.	Date of registry.	Amount.
	R. Haisch	Oct'r 26, 1881	76 50
	P. Blumers	" "	56 65
	"	" "	91 80
	Wm. Graff	" "	76 50
	F. Kaster	" "	76 50
	W. Gogreve	Nov. 7, "	91 80
	Sun Mutual Ins. Co.	" "	52,320 00
	O. Dameel *& als.*, ex., &c.	" "	4,173 75
	Philipi & Thomas	Nov. 16, "	15 30
	" "	" "	25 50
	Jean Denecausse	" "	76 50
	"	" "	57 37
34	Fred Lahn	Nov. 22, 1881	77 25
	"	" "	77 25
	F. Schmidt	" "	76 50
	C. E. Girardey	" "	1,000 00
	"	" "	1,500 00
	Owen Kurnan	Dec. 20, "	357 00
	Henry Federon	Dec. 27, "	56 95
	"	Dec. 24, "	77 25
	"	" "	91 80
	Mrs. Philips	Dec. 28, "	10 20
	J. Thomas	" "	77 00
	Herman Rolly	Dec. 31, "	20 40
	"	" "	91 80
	F. Stutz	" "	77 25
	"	" "	51 50
	"	" "	91 80
	Dan'l Marcy	Jan'y 26, 1882	3,390 00
	Mary Meyers	March 5, "	91 80
	John Harney	" "	76 80
	"	" "	7 72
	"	" "	38 62
	"	" "	51 50
	"	" "	77 25
	Jos. Murray	" "	76 50
	R. M. Anderson	" "	77 25
	"	" "	77 25
	Jos. Harney	" "	51 50
	Rebecca Wolff	" "	540 00
	Freeman Clarke	March 23, "	1,800 00
	"	" "	1,800 00
	Wm. H. Riggs	" "	3,240 00
	Jno. T. Michel	May 17, "	445 16
35	N. O. Gas-Light Co.	June 25, 1882	46,550 66
	J. McConnell	July " "	57,763 30
	Pontchartrain R. R. Co.	Sept'r " "	34,428
	Pat. Short	Nov'r 19, "	51 50
	L. Falk	Feb'y 20, 1883	30 60
	Jos. Thrain	" "	77 00

Judgment creditor.	Date of registry.	Amount.
Jacob Arnold	Feb'y 20, 1883	33 90
"	" "	25 65
V. P. Bachilier	" "	56 65
"	" "	41 10
Marie Simon	" "	91 80
"	" "	77 25
"	" "	77 25
Wid. P. Cornet	" "	77 25
Henry Forchler	" "	58 62
B. Cabirac	" "	25 75
J. H. Guerchoux	" "	20 40
Wm. Munthey	" "	91 80
Adam Scherer	" "	92 70
Henry Forschler	" "	91 80
B. Gaillardanne	" "	77 25
E. E. Georgest	" "	25 50
L. Nicholas	" "	15 30
B. Cabirac	" "	87 30
Wid. P. Cornet	" "	77 25
B. Gaillardanne	" "	91 80
"	" "	20 40
Henry Jurgens	" "	91 80
M. Reas	" "	91 80
Adam Scherer	" "	91 80
F. Kuhn	" "	92 70
36 Henry Jurgens	" "	51 50
Wid. P. Cornet	" "	91 50
Raphael Ferro	" "	77 25
Mrs. Wundug	" "	76 50
B. Cabirac	" "	100
M. Reas	" "	92 70
Adam Scherer	" "	90 80
F. Kuhn	" "	91 80
H'y Forchler	" "	70 50
B. Cabirac	" "	85 55
Thos. Fitzwilliam & Co.	Feb'y 26, "	525 55
C. A. Millenberger	March 1, "	862 50
A. G. Blanchard	April 20, "	311 60
Sam'l Browne	May 25, "	393 75
John Kaiser	" 29, "	1,033 33½
Myra Clark Gaines	June 2, "	1,925,667 83

A true copy from books in comptroller's office.
New Orleans, June 12th, 1883.
(Signed) TH. BUISSON,
For Comptroller.

Document Filed with Answer June 12th, 1883, by Committee on Budget Expenses.

An ordinance to levy city expense and debt, tax for the year 1883.

SECTION. 1. Be it ordained by the city council that a tax
37 of two per cent. on the assessed valuation of all property subject to taxation within the limits of this city, as per assessment rolls be, and the same is hereby, imposed, payable as soon as the tax-bills shall be ready, of which notice by publication shall be given to the taxpayers.

SECTION 2. Be it further ordained, That said two per cent. (2%) tax shall be, and is hereby, apportioned according to law, as follows:

One per cent. (1%) for alimony of the city, to be styled the City Expense Tax.

One per cent. (1%) imposed under authority of act No. 31, acts of 1876, and decisions of the supreme court of the State thereon, and act No. 58, acts of session of 1882, to be styled City Debt Interest and Redemption Tax, the whole to be specially appropriated according to law.

COUNCIL CHAMBER,
NEW ORLEANS, *June* 12, 1883.

This is to certify that the above and foregoing is a true and correct copy of an ordinance introduced by the committee on budget expense, &c., in the city council on Tuesday, June 5th, 1883, read in full and first offering and ordered to lay over, in
38 accordance with city charter, as will more fully appear by reference to the proceedings of the city council of date June 5, '83, under the head of "new business."

(Signed) W. H. MICHEL,
Ass't Clerk and Acting Clerk of City Council.

Document Filed with Answer June 13th, 1883.

Official.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *30th December*, 1882.

An ordinance adopting an estimate of the revenues of the city of New Orleans for the year 1883.

Be it ordained by the council of the City of New Orleans, That the following estimate of the revenue for the year 1883 be, and the same is hereby, adopted:

1. Tax of ten mills on the valuation of real estate & personal property, as per assessment-rolls of $117,122,167.14, for interest on redemption of bonds, as per acts 31 of 1876, & 58 & 68 of 1882 . . . $1,171,221 67

2. Tax of ten mills on $117,122,167.14 for city expenses	$1,171,221 67		
3. Licenses	250,000		
4. Markets	195,181 84		
5. Bills receivable	12,500		
6. Interest & law charges	27,500 00		
7. Fines & fees	20,000 00		
8. Ground rents	4,000		
9. Rents & privileges	3,000		
10. Sales of vehicle numbers	1,400		
11. Boys' house of refuge	250		
12. Cemeteries	750		
13. Pond fees	500		
	1,686,303 51		
Less 25% reserved as per sections 65 & 66 city charter	421,575 87		
		1,264,727 64	
14. Wharves & landings as per contract		40,757 55	
		$1,305,485 19	

Adopted by the council of the City of New Orleans, 29th December, 1882.

M. McNAMARA,
Clerk of Counsel.

Approved 30th December, 1882.

W. J. BEHAN, *Mayor.*

A true copy.

C. L. WALKER,
Secretary to the Mayor.

MAYORALY OF NEW ORLEANS,
CITY HALL, *30th December*, 1882.

(No. 50. Council series.)

An ordinance adopting an estimate of the expenditures of the City of New Orleans for the year 1883.

Be it ordained by the council of the city of New Orleans, That the following estimate of expenditures (including police and schools) for the year 1883, be, and the same is hereby, adopted:

Contracts—fire department:

New Or'ls fire dep't	160,000 00	
5th dist. " "	14,000 00	
6th " " "	18,000 00	
7 " " "	12,500 00	
		$204,500 00

Lighting the city:

N. O. Gas Light Co.	58,000 00	
Est'd cost of lighting public b'l'd'g	10,000 00	
Lighting 6th & 7th dist's	11,715 00	
" city with oil	15,000 00	
		94,715 00

Department of public works:

Office salaries & expenses of office	3,800	
Streets, bridges, draining machines, wages of employees	220,429 61	
		224,429 61

Department of police & public buildings:

Salaries & expenses of office	3,150	
Markets	16,840	
Public pounds	2,000	
" squares	8,000	
Boys' house of refuge	13,100	
Removal of sick & dead	4,000	
Cemeteries	500	
Conveying prisoners, forage, &c.	1,200	
Fire alarm telegraph	13,500	
Police jail	5,320	
Maintenance of prisoners	13,389	
Court-house salaries	4,000	
Home of aged, infirm, &c.	5,000	
41 Repairs to public buildings	10,000	
" " engine houses	5,000	
" " city hall buildings	1,000	
Public sinks as per contract	2,400	
7 porters for district courts	4,080	
Expense of supplies for parish	15,000	
		127,479 90

Department of assessments:

Salaries & expenses in accordance with sec. 3, act 96, 1882	16,000	
Extra expenses in making assessment in 1883	3,000	
		19,000 00

Department comptroller:

Salaries & expenses	9,000	
Tax mortgaged registers, &c.	4,560	
" bills	10,000	
		23,500 00

Department of city treasurer:

Salaries and expenses	12,500 00

Surveyor's office:

Salaries & expenses, including surveyor & one inspector	10,000 00

Mayor's office:		
Salaries and expenses		5,000 00
City hall building:		
Salaries of librarian, keeper of archieves, and porters		4,620 00
City council:		
Clerk & assistant clerk	3,200	
Sergeant-at-arms	3,600	
Three committee clerks	900	
Stationery	300	
		$8,000 00
42 City attorney's office:		
Salaries & expenses	10,500 00	
Public printing:		
Proceedings of council	10,000 00	
Criminal & city courts:		
Yearly payment on St. Patrick's Hall	6,712 63	
Insurance on same	212 50	
Rent of 2d city court @ 35 pr. month	420	
" 4th " " 25 "	300	
" room for court @ 50	600	
" central police station	3,000	
" " " "	600	
		11,845 13
Interest on Park notes	7,560	
Meals for jurors	1,800	
Salaries for employees	5,300	
Jury commission	3,600	
		10,700 00
Mayor & coroner		17,000
Board of health		6,000
Support of orphans		41,818
Law charges		5,000
Coroner & assistant	8,000	
Stationery	100	
		8,100
Salaries of recorders & clerks		20,600
Stationery, fuel, etc., for courts		2,000
Public schools		185,000
Police		185,000
Erection 7th dist. fire alarm telegraph		5,000
43 Wharves & landings for harbor police	30,000	
Wharfingers, contravention clerks, other employees	10,000	
Ordinance No. 7,482, 6th & 7th districts	757 55	
		40,757 55
		$1,305,485 19

Adopted by the council of the City of New Orleans 29th December, 1882.

M. McNAMARA,
Clerk of Council.

Approved 30th December, 1882.

W. J. BEHAN, *Mayor.*

A true copy.

C. L. WALKER,
Secretary to the Mayor.

Official.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *9th Feb'y*, 1883.

(No. 100. Council series.)

An ordinance amending an ordinance adopting an estimate of the expenditures of the City of New Orleans for the year 1883.

Be it ordained, That the under-mentioned items in the estimate of expenditures of the City of New Orleans for the year 1883 be altered and amended as follows:

Under the head of "Lighting the city with oil," from $15,000 to $12,128.12.

Under the head of "Dep't of public works," office salaries, and expenses of office, from $3,800 to $5,000.

44 Under head of "Department of public works," streets, bridges, &c., from $220,429.61 to $198,010.00.

After the second item in "Department of public works," streets, bridges, &c., add materials, $31,841.49.

Under the head of "Department of police & public buildings," salaries & expenses of office, from $3,150 to $3,000.

Under the head of "Dep't of police & public buildings," markets, from $16,840 to $15,520.

Under the head of "Dep't of police & public buildings & public pounds," from $2,000 to $2,100.

Under the head of "Mayor's office," salaries & expenses, from $5,000 to $3,500.

Under the head of "City hall building," salaries of librarian, keeper of archives, & porter, from $1,620 to $4,260.

Under the head of "Salaries for employees in parish prison," $5,000.

That this item be striken out, having been transferred to "Dep't of improvements" in the account of materials, $300.

Under the head of "Dep't of public b'l'd'gs," expenses of supplies for parish prison, from $15,000 to $15,780.

Adopted by the council of City of N. O. Feb'y 7th, 1883.

M. McNAMARA,
Clerk of Council.

Approved 9th Feb'y, 1883.

W. J. BEHAN, *Mayor.*

A true copy.

C. L. WALKER,
Secretary to the Mayor.

45 *Hearing and Submission of Motion for Mandamus.*

Extract from Minutes. April Term, 1883.

NEW ORLEANS, TUESDAY, *June 12th*, 1883.

Court met pursuant to adjournment.

Present: Hon. E. C. Billings, district judge.

U. S. *ex rel.* MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 10316.

This cause came on to be heard on the petition and return of the respondent to the same, and was argued by the counsel for the parties, respectively, and submitted.

Whereupon the court took time to consider.

The relator offered in evidence in support of her petition—

1. The record proper in case numbered 8825 on the docket of this court, consisting of the bill, the amended bill, the answer to bill, and amended bill, the replication to the same, the opinion of the court, and judgment of 5th May, 1883.

46 2. The writ *fieri facias* in said case No. 8825, and return thereon, so far as made by the marshal, the same having been produced by E. S. Wurzburger, deputy marshal.

3. The garnishment, proceedings, and answers of the garnishees in said suit No. 8825.

4. The returns of the marshal on the writs of *fieri facias* in suits numbered 10213, 8535, 10193, 10183, 9697, 9731, 1009, 9933, 10149 10081, 10082, 9899, 10041, 10141, 9774, 9666, 9813, 9790, 9768, 9544, 9506, 9351, 9444 on the docket of this court.

Bill of Exceptions. Filed June 14th, 1883.

United States Circuit Court, 5th Judicial Circuit for the Eastern District of Louisiana.

UNITED STATES OF AMERICA *ex rel.* MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 10316.

Mandamus.

Be it remembered, to wit, on the 12th day of June, 1883,
47 of the April term of said court, of 1883, this cause came on for hearing, the said relator being represented by her counsel therein, and the said respondent being represented by Charles F. Buck, city attorney, J. R. Beckwith and H. C. Miller, of counsel; the said cause was called for hearing upon the petition and motion of the respondent, City of New Orleans, the return of the City of New Orleans, as the same appear and are on file and of record.

Whereupon, both parties being ready, the respondent claimed the right of trial by jury, which the court, upon objection by the relator, refused upon the ground that this proceeding, though in form of a writ of mandamus, was in fact a proceeding in a cause in equity

and triable as such, to which said ruling and refusal of the court the said City of New Orleans, respondents, by her counsel, did then and there except; that whereupon the said relator did produce, and submitted, and exhibits the following evidence in said cause, and no more and no other, viz: the record in the case named in re-
48 lator's petition being No. 8825 of the docket of the circuit court, consisting of the bill and amended bill of complaint, the answers to said bill and amended bill, the replications to the same, the opinion of the court filed May 3d, 1883, and judgment and decree of the court therein, dated May 5th, 1883, and the writ of *fieri facias* issued in the said cause No. 8825, and the return thereon, so far as made by the marshal; the garnishment proceedings, the answer of the garnishees in the said suit No. 8825.

Bill of complaint referred to and made part of foregoing bill of exceptions:

Bill of Complaint. Filed August 7th, 1879.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 8825.

To the honorable the judges of the circuit court of the United States for the fifth circuit and district of Louisiana, sitting in equity:

Myra Clark Gaines, a citizen of the State of New York, residing in Brooklyn, in said State, brings this, her bill of complaint,
49 against the City of New Orleans, a corporation established by the laws of Louisiana, located in the parish of Orleans, and thereupon your oratrix complains and says—

1. That Daniel Clark, late of the City of New Orleans, in the State of Louisiana, at the time of his death being seized in fee simple and lawfully possessed of certain lands and negro slaves, rights, credits, and other property of great value, did, on or about the 13th day of July, in the year eighteen hundred and thirteen (1813), duly make, execute, and publish his last will and testament in writing; and, thereupon, amongst other things, acknowleged your oratrix to be his legitimate and only child, and bequeathed to her all the estate, whether real or personal, of which he might be possessed, subject only to the payment of certain legacies thereinafter named; and that the said testator departed this life on or about the 16th day of August, in the year 1813, not having revoked or annulled the said last will and testament or the provisions therein for the benefit of your oratrix aforesaid, but leaving the said last will and every part or portion thereof in full force and effect, and that after the
50 death of the said testator, to wit, on or about the 18th day of January, 1855, your oratrix applied to the second district court of New Orleans, the court having jurisdiction of such matters for the probate of the said will; that upon the hearing of the application of your oratrix the said court rejected the same; that afterwards in due time the said cause was appealed to the supreme court of Louisiana, whereupon, after due proceedings, the said supreme court reversed the judgment of the said second district court and

proceeding to render such judgment as should have been rendered by the lower court, ordered, adjudged, and decreed that said will of Daniel Clark, dated July 13, 1813, as set forth in the petition of your oratrix, be recognized as his last will and testament, and that it be received, recorded and executed as such; that on the 23d February, 1856, the mandate of the supreme court was filed and recorded in the said second district court, and the said will was duly recorded in the book of wills of said court, on the said 23d day of February, 1856, in book 10, page 307; all of which will more fully
51 appear from an authenticated copy of said will and the probate thereof hereunto annexed and made part of this bill, as found on pages 7 to 9 inclusive, of the printed record of the suit of Myra Clark Gaines *vs.* The City of New Orleans, No. 2695 of the docket of this court, hereto annexed and referred to as Exhibit A.

That the whole estate of said Daniel Clark, by the laws of the State of Louisiana, and in pursuance of the said last will, vested in your oratrix on the death of the said testator.

II. And your oratrix further shows, that the said Daniel Clark made a provisional will in the year 1811, in which he made his mother, Mary Clark, his universal legatee, and one Richard Relf and Beverly Chew his executors; that said will of 1811 was probated in the City of New Orleans, and said Relf and Chew qualified as executors; that said will of 1811 was revoked by the said will of 1813.

III. And your oratrix further shows, that according to
52 the best of her information and belief she became of age on the 31st day of December, 1827; that in tender infancy and before the death of the said Daniel Clark she was removed from New Orleans to Philadelphia, in the State of Pennsylvania, and was one of the family and bore the name of S. B. Davis; that until about the time of her first marriage, to wit, to William Wallace Whitney, which was about the year 1832, she was kept in ignorance of her history, parentage, rights, and even her name; that on becoming acquainted with her parentage and rights, on or about the 18th of June, 1834, she instituted suit in the probate court of New Orleans for the purpose of proving said last will of said Daniel Clark, but that said suit was dismissed, as in case of non-suit, on the 8th June, 1836, your oratrix and her said husband, W. W. Whitney, instituted suit in the District Court of the United States for the Eastern District of Louisiana, known as suit No. 122 of the docket of said court, to set up the said will of 1813, and to enforce her rights under the same, and as heir-at-law of the said
53 Daniel Clark, by bill in chancery against this and various other defendants for various properties belonging to the said estate of said Daniel Clark; that the Supreme Court of the United States in 1844 held that the said will of 1813 should be proved in the probate court of the State before any title to property could be set up under it, and her claim as heir-at-law was finally decided against her in April, 1852, and on the 18th day of January, 1855, your oratrix filed her petition to have the said will of 1813, of the said Daniel Clark probated, which was done on the 17th December,

1855; received and recorded in the said second district court as aforesaid on the 23d February, 1856.

IV. And your oratrix further shows, that in the aforesaid bill in chancery, No. 122, filed as above stated, July 28th, 1836, and in various supplemental bills and amendments thereto, your oratrix claims, as besides other properties belonging to the said Daniel Clark at the time of his death, and therefore vested in your
54 oratrix, though at the time of filing of said bill, in the illegal possession of the said City of New Orleans, the certain tract of land, being the tract described in said bill as number six, as "a piece, parcel, or tract of land situated in the quarter of Bayou St. John, in the parish of Orleans, containing about one hundred and thirty-five arpents, and adjoining the road of the Canal Carondelet, and the land of E. Conchieux, running thence along Broad street to Bellechasse street by the faubourg St. John, and the land which, in the month of October, 1821, was owned or possessed by Mr. Hercy; thence to the land of Evariste Blanc, and the Bayou St. John, in conformity with a plan drawn by Joseph Pilie, dated August, 1821, and annexed to an act of sale of said tract, made by Richard Relf and Beverly Chew to Evariste Blanc, and passed before Philip Pedeschaux on the 30th day of October, 1821, together with all the buildings, tenements, hereditaments thereunto belonging or in anywise appertaining."

That said City of New Orleans and Municipality No. One
55 were made defendants and duly subpœnaed to answer said bill in the year 1836.

That subsequently, to wit, on the 19th June, 1849, the First Municipality of New Orleans (which by an act of the Legislature of the State of Louisiana, in 1836, had succeeded to the rights of the said City of New Orleans in and to said lands), besides other pretended defences in her answer set forth, declared and admitted being in possession of said described property, but claimed "title to the said described tract of land by means of a purchase which the City of New Orleans made of the same from Evariste Blanc on the 21st of September, 1834, by an authentic and public act passed before Felix D'Armas, a notary public of the City of New Orleans;" and said answer further alleged "that the aforesaid vendor, Evariste Blanc, acquired title to said property by virtue of an act of sale to him, the said E. Blanc, passed in due form of law on the 30th October, 1821, before the late P. Pedesclaux, then a notary public of this
56 city, from Mess. Richard Relf and Beverly Chew, in their respective individual capacities, and as agents general and special of Mary Clark, the mother and sole heiress and universal legatee of Daniel Clark, then deceased, and by virtue of powers of said Mary Clark, then of Germantown, in the State of Pennsylvania, dated in the month of October, 1813, deposited in the office of the late John Lynd, then a notary public."

V. And your orator further shows: That the said bill of complaint having been dismissed, she on the 22d December, 1856, exhibited her other certain bill of complaint, which was duly filed in this honorable court, and known as No. 2695 of the docket, against

the said City of New Orleans and others in said bill set forth, in which, as the legitimate and only child of said Daniel Clark, and as his sole heir and universal legatee under his said last will and testament as aforesaid, she sought to recover from the said City of New Orleans the said above-mentioned tract of land and the fruits and revenues thereof, as will more fully appear by the said bill of
57 complaint on pages 1 to 6, inclusive, of Exhibit A, to which she begs leave to refer as part of this bill.

That said defendant, the City of New Orleans, was duly summoned by subpœna to answer said bill, and did appear and *did appear and* answer to the same on the 27th April, 1857; that in and by said answer the said City of New Orleans alleged title to said described property substantially in the manner and form set forth in the answer of the said First Municipality filed on the 19th June, 1847, as heretofore set forth, claiming title to the same, through Evariste Blanc, from Richard Relf and Beverly Chew, acting as the agents and attorneys-in-fact of Mary Clark, the alleged universal legatee of said Daniel Clark by his will of the 20th May, 1811; and in said answer the said City of New Orleans substantially alleged that subsequent to said purchase from Evariste Blanc the said municipalities were dissolved by public law of the State of Louisiana, and the entire territorial jurisdiction of the whole was consolidated into one corporation *to* the City of New Orleans, who thereby stood in the place and
58 stead of the ancient corporation, as also the intermediary one, the said First Municipality, and truly became, in law and equity, bound by the obligations of both.

And the said City of New Orleans further answered substantially that at the time of the filing of the said bill of complaint she was the owner and possessor of only a portion of said property, to wit, that portion embraced between St. Peter street, Hagan avenue, Orleans street, and Lake road; and said answer further alleged that previous to the filing of said bill in said suit 2695, and during the pendency of said suit No. 122, the said City of New Orleans did cause the said property to be laid out into squares and parts of squares and subdivided by streets, and that said squares and parts of squares, with the exception above, were sold by said City of New Orleans and First Municipality to divers persons; all of which will more fully appear by the said answer, and the exhibits thereto annexed, of the City of New Orleans, to which reference is prayed, and found
59 on pages 12 to 70, inclusive, of said printed record No. 2695, Exhibit A.

VI. And your oratrix further shows that on the 19th April, 1858, judgment was rendered by said circuit court against your oratrix dismissing her said bill of complaint; that from said judgment your oratrix took an appeal to the Supreme Court of the United States; that after hearing thereof the said Supreme Court reversed the said judgment of the circuit court, and rendered judgment and a decree in her favor; that in accordance therewith said circuit court, on the 11th June, 1870, rendered judgment decreeing your oratrix, complainant in said cause, to be the only legitimate child of said Daniel Clark, and as such exclusively invested with the char-

acter of such legitimate child, and entitled to the rights of the same, and that under and by virtue of his last will and testament she is his universal legatee, and as such entitled to all the estate of which he died possessed, including the said tract of land set forth in said bill and this bill, being the tracts so sold by said Richard
60 Relf and Beverly Chew, as testamentary executors, etc., to Evariste Blanc, on the 30th October, 1821, and by said Blanc to the mayor, aldermen, and inhabitants of the City of New Orleans, on the 26th September, 1834, and that the said pretended sales of the 30th October, 1821, and 26th September, 1834, were utterly unauthorized and illegal, null and void, and in derogation and fraud of the rights of your oratrix.

And by said judgment it was further ordered and decreed that said City of New Orleans immediately surrender to the complainant, your oratrix, that portion of said property which at the filing of said bill remained unsold and in possession of said City of New Orleans.

And it was further adjudged that an account be taken by John B. Weller, master in chancery, of the yearly rents and profits of said land whilst in possession of said defendant, as will more fully appear by a copy of said judgment hereto annexed as part of this bill, and marked Exhibit B.

VII. Now, your oratrix further shows, that in the proceed-
61 ings had before said master, John B. Weller, it appeared that said City of New Orleans and First Municipality had during their respective possessions derived no rents and profits from that portion of the property which they had subsequently sold, and hence none were found by said master to be due and owing by said city to said complainant; but your oratrix charges that the reason why no fruits and revenues were so derived was exclusively owing to the lack and absence of ordinary good management on the part of the said City of New Orleans and First Municipality during their occupancy and possession thereof; that had said *said* City of New Orleans and First Municipality used and exercised ordinary good management of said property during the time of their possession, or that your oratrix been allowed possession thereof, large amounts of fruits and revenues could and would have been derived therefrom, the exact amount whereof, though not known to your oratrix, she understands, believes, and so charges to exceed annually the sum of twenty thousand dollars, and which amounts with in-
62 terest as may be found on the due accounting therefor is in the premises due by said City of New Orleans to your oratrix.

VIII. And your oratrix further shows that owing to the sales of said property to various parties, as set forth in the said answer of said City of New Orleans in suit No. 2695, it became necessary for your oratrix in order to recover possession of various portions of said property by said sales placed in the illegal possession of said purchasers to institute actions against each and all of them. That accordingly, in the year 1862, she instituted her several suits against the various parties who she understood were, respectively, then in possession of the various squares & lots into which said property

had been divided as aforesaid, and who pretended to hold and possess the same, either directly or through mesne conveyances under the said sales by the said City of New Orleans and the First Municipality, oratrix therein claiming against said possession the ownership and right of possession and the right of fruits and revenues therefrom. That owing to the fact of the United States authorities being deprived of actual jurisdiction over the State of Louisiana, there existed at the time no circuit or other courts of the United States wherein her said actions could be brought. That instead, and assuming to usurp and take the place thereof, there was established by the so-called Confederate States, then having and exercising absolute jurisdiction, a court termed and entitled the district court of the Confederate States for the district of Louisiana, and in which your oratrix instituted said suits. That owing to various pleas set up therein, including, among others, that your oratrix was an alien enemy of said Confederate States, and, therefore, could not sue therein, and delays caused by the same, the said suits remained untried and undetermined at the time the authority of said so-called Confederate States over the State of Louisiana ceased and was replaced by the authority and courts of the United States, and whereby your oratrix was unable, through and by means of said suits, to obtain a judicial recognition of her rights or possession of said property or the fruits and revenues thereof.

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IX. And your oratrix further shows:

That upon the reorganization of the Federal courts in this district your oratrix, by her two certain bills of complaint, entitled Myra Clark Gaines *vs.* P. H. Monsseaux *et als.* and Myra Clark Gaines *vs.* P. F. Agnelly *et als.*, Nos. 3663, 6085 of the docket of this honorable court, instituted suits against the various parties who were then in possession of said property, & who claimed, as oratrix was informed, ownership and possession thereof, under titles derived from said city of New Orleans and First Municipality by the said sales, as hereinbefore set forth.

That to said respective bills of complaint a large number of defendants filed pleas, and, after the same were overruled, answered, setting up various defenses, and among others, claiming title to the respective portions of said property in their possession, under and through various mesne conveyances, with full warranty of title, with subrogation from the said City of New Orleans and the First Municipality of New Orleans, as will more fully appear by their respective answers filed in said suits, to which your oratrix asks leave to refer for greater certainty.

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That after trial judgments were rendered in said two cases at the April term, 1877, of this honorable court in favor of your oratrix against said several defendants, decreeing your oratrix to be the legitimate and only child of the said Daniel Clark and universal legatee under his last will and testament, and as such justly entitled to the property claimed by her and in the illegal possession of said defendants, together with all the yearly rents, profits, and value for use accruing from the same since the same respectively came into the possession of the said defendants, and an account of which said

rents and profits & value for use, accrued or accruing, it was by said judgments ordered should be taken by Ernest Sabourin and J. W. Gurley, masters in chancery.

That by said judgments it was further adjudged that the conveyance from Richard Relf and Beverly Chew, assuming to act
66 under the pretended authority of testamentary executors of said Daniel Clark and of attorneys-in-fact of Mary Clark by the act of sale dated 30th October, 1821, to Evariste Blanc, was wholly unauthorized and illegal, null and void, and that all the subsequent conveyances by which the said property was attempted to be transferred and conveyed from said Evariste Blanc to said respective defendants were made without any legal right or authority whatsoever to sell or dispose or to pass, convey, or transfer said property, and were wholly unauthorized and illegal and utterly null and void and in fraud of the rights of your oratrix.

That as regards the defendants in possession who did not appear to plea and answer final judgments *pro confesso* were rendered in favor of your oratrix similar to the judgments rendered against those defendants who answered, as will more fully appear by the respective judgments rendered against those defendants who answered, as will more fully appear by the respective judgments so ren-
67 dered in said suits Nos. 3663, 6085, reference to which for greater certainty is respectfully prayed and to the list thereof hereto annexed as part of this bill as Schedule C.

X. And your oratrix further shows that, in accordance with that portion of said judgments ordering accounts to be taken by Masters Sabourin and Gurley of the yearly rents and profits accrued or accruing from said respective pieces of property since the respective dates when they came into the possession of said respective defendants, such accounts have been taken as regards a large number of said defendants, showing large amounts to be due your oratrix; that a large number of said reports have been approved by and made the judgment of this honorable court; that as to the remaining defendants, some of the reports are made and on file unopposed and awaiting the action of the court; all of which will more fully appear by said reports and judgments thereon and on file in said suits, to which reference is asked and to said detailed statement in Schedule C.

68 XI. And now your oratrix charges that said City of New Orleans and First Municipality, by their illegal and fraudulent acts and doings, commencing at the time the said City of New Orleans illegally obtained possession of said property through and by means of the said illegal and fraudulent act of sale from said Evariste Blanc on the 26th September, 1834, and extending continuously up to the rendition of the several judgments in said suits Nos. 3663–6085, in favor of oratrix, prevented your oratrix from the possession and enjoyment of said property.

That after the filing of your oratrix's bill of complaint on the 28 July, 1836, in the suit No. 122, and during the pendency said City of New Orleans and First Municipality, for, among other, the illegal purpose of rendering pecuniary benefit thereupon, and render it more diffi-

cult for your oratrix to obtain possession of her said property, and its use, and redress of the wrongs and injuries by her suffered, sold, as hereinbefore said, said property, by squares and lots, to divers persons
69 who, though knowing the illegal & fraudulent character of said sales, yet owing to the general and special warranty of their said vendor protecting them against all dangers of eviction and of being compelled to restore to your oratrix the fruits and revenues and value for use which might be derived therefrom, were willing to and did take, through form of sale, the illegal possession of said property, and conspire with the said City of New Orleans and First Municipality to impede, harass, and prevent your oratrix from obtaining possession of her said property and the enjoyment of the fruits, revenues, and value for use which under proper and ordinary good management would have been derived therefrom.

That through illegal acts and doings the said City of New Orleans and First Municipality at divers times received large sums of money, being the prices of said illegal and fraudulent sales, the amounts of which or the times at which they were so received is unknown to your oratrix, though understood, believed, and therefore
70 charged to be over four hundred thousand dollars, and which sums of money the said City of New Orleans has had the continuous use and benefit.

XII. And your oratrix is further informed and believes, and so charges, that through various mesne conveyances the possession of said property so sold by the said City of New Orleans and First Municipality passed through various possessors and alleged owners previous to its possession by the parties in possession at the filing of oratrix's bills of complaint in said suits Nos. 3663, 6085, each of said possessors holding respective portions thereof and during different periods; all and each obtaining and taking possession with the same full knowledge of the rights and ownership of your oratrix thereto, and the knowledge that when the said Richard Relf and Beverly Chew on the 30th October, 1821, sold said property to Evariste Blanc they had no legal right or authority whatever so to sell and dispose of or in any manner to alienate the same, and that the sale of said Evariste Blanc to the City of New Orleans and the sales of the City of New
71 Orleans and First Municipality to their direct venders, as well as all the subsequent and intermediate conveyances by which any portion of said property was attempted to be transferred from the said City of New Orleans and First Municipality to said subsequent purshasers were made without any legal right or authority whatsoever, and were utterly null, void, and fraudulent, and to the manifest wrong and injury of your oratrix; that the various persons so holding possession of respective portions of said property, their residences, as well as what portions, and the duration of their respective possessions, as well as in case of their death, the names and residences of their heirs are unknown to your oratrix, but she is informed, believes, and so alleges that many of them are dead, leaving insolvent estates, others absent from this district, rendering it impossible to obtain summons upon them, and your oratrix prays that the said City of New Orleans, as their vendor and warrantor

and joint conspirator against the rights of your oratrix,
72 may he held to answer and defend this bill, not only on her own behalf, but on behalf of said possessors, with the right reserved to any and all said possessors should any of them desire to appear and answer this bill.

XIII. And your oratrix further charges that, though by the rules and practice of this court in chancery, said defendants in said suits, No-. 3663, 6085, could not call in their said warrantors, yet some of said defendants prayed that said City of New Orleans might be made party defendant, as warrantor, and subpœna was served on said defendant, the said City of New Orleans, who, by her exception pleaded the said peculiar rules and practice of this court as a ground for her exemption as a party defendant, and which exception was sustained, but by which call in warranty, as through other means, said City of New Orleans was made fully aware of the pendency of said suits.

That although the said City of New Orleans thus avoided
73 being a party as warrantor of said defendants, and thereby avoided judgment being rendered against her, and, though the final degree rendered against her in the said suit No. 2695 declared your oratrix to be the only child and universal legatee of her father, Daniel Clark, and as such entitled to his whole estate; that the property claimed from said defendants was a portion of his estate, and belonged to your oratrix; that the pretended title of said City of New Orleans to the same was illegal, and on the part of said city fraudulent; that the charge set up in the answer of said city in said suit No. 2695, that your oratrix was an adulterous child, and therefore could not inherit as heir and universal legatee of her father, had been adjuged false; yet, notwithstanding this and many other facts and things known to said City of New Orleans, her mayor and administrators, and her counsel and solicitors, establishing the fraudulency of her said acts, the said City of New Orleans, by the employment of counsel, who, though acting as the solicitors of many of the
74 said defendants, were the special solicitors employed and paid by the said city, and with the understanding that they should specially represent the interest of said city, resisted the recognition of the rights of your oratrix to recover possession of said property, and fruits, revenues, and value for use.

That among the various illegal and oppressive acts resorted to by said City of New Orleans to delay and defeat your oratrix in obtaining her rights, as claimed in said suits, Nos. 3663, 6085, were the following:

When, on the rendition of the final judgment of the Supreme Court in favor of oratrix against said City of New Orleans in the said suit No. 2695, which judgment fully recognized the title of your oratrix to said property, and declared the said pretended title of said City of New Orleans to be null and fraudulent, the said defendants in suits Nos. 3663, 6085, who held possession of portion of said property under said City of New Orleans to the number of two hundred and twenty-eight, acting in accordance with the affirma-

tion of said Supreme Court, it was supposed after the
75 decision in Gaines *vs.* Hennen, that the litigation pursued in one form and another for over thirty years by the complainant to vindicate her rights in the estate of her father was ended," and as an answer to the question of the court: "Can we not indulge the hope that the rights of Myra Clark Gaines, in the estate of her father, Daniel Clark, will now be recognized?" said defendants petitioned said City of New Orleans "to take such action, by compromise with her (your oratrix) as will quiet our (said defendants') titles and relieve us (said defendants) from further litigation."

That, notwithstanding said petitioners, defendants in said suits Nos. 3663, 6085, thus recognized the rights and title of your oratrix to the property claimed by her in said suits Nos. 3663, 6085, and did not desire to contest the same, knowing that such contest would not only be unjust to your oratrix but useless and expensive to themselves, the said City of New Orleans refused to comply with said memorial, as in equity and good conscience she should have
76 done, and by divers machinations and acts of deception towards said memorialists, attempted to persuade them that, notwithstanding the decision rendered in favor of oratrix against said city, a successful defence could be made by them in said suits Nos. 3663, 6085; and at other times, by threats and intimidations, declaring that unless said memorialists resisted the claim of your oratrix and plead such defenses and resorted to such means as said solicitors, selected by said city and acting as solicitors of said defendants, should suggest, they, the said def'ts, though holding, with full warranty & subrogation from said city, possession and title to said property, would loose and forfeit, in case of eviction, their rights and action of warranty against said City of New Orleans; and, further, gave the said def'ts to understand that, should judgments be rendered adverse to them, the said city would, as in law and equity bound, save themselves harmless by immediate settlement & payment of said judgments to your oratrix.

And to further delay & harass your oratrix in her said re-
77 covery in the said suits Nos. 3663, 6085, the said City of New Orleans, jointly in her own name & in the name of the said def'ts in suits Nos. 3663, 6085, whose names she persuaded them to allow her the use of on the 27 May, 1869, instituted in the second district court for the parish of Orleans the certain suit entitled and numbered Joseph Fuentes *et als. vs.* Myra Clark Gaines, No. 32979 of the docket, wherein was sought to be rescinded the said judgment of probate of the said last will of Daniel Clark rendered by the supreme court of Louisiana on the 17th December, 1855. That the right of said parties plaintiffs to institute the said action was alleged to be the fact; that said pl'ff's held title to the property claimed by oratrix from them in said suits Nos. 3663, 6085, from Richard Relf and Beverly Chew, executors of the will of said Daniel Clark of 1811.

That among the grounds for annulment of said probate was the averment that your oratrix was an adulterous bastard of her said father, Daniel Clark, and that, notwithstanding that the question of

status of your oratrix had previously been judiciously estab-
78 lished and recognized by the Supreme Court of the United States in several final judgments, wherein said issue was raised, including the said suit of Myra Clark Gaines *vs.* City of New Orleans, No. 2695, wherein your oratrix was recognized as the legitimate child of said Daniel Clark, and which judgments were *res adjudicata* against the whole world, especially said plaintiffs; that though said suit of Fuentes *vs.* Gaines was ultimately decided on the 30th April, 1877, by this honorable court, to which it had been removed and numbered 8038 of its docket, in favor of your oratrix, yet your oratrix charges that the same was instituted and successfully used to delay and harass her in the prosecution of the said suits Nos. 3663, 6085.

In fact, your oratrix charges the truth to be that during the whole period since she discovered her parentage and commenced her legal struggle for the recognition of her birthright and the recovery of her inheritance up to the present time the said City of New Orleans through her respective mayors, boards of alderman, and administrators has continuously resorted to all means in her power to op-
79 press, thwart, and crush your oratrix in her said legal efforts, and has been one of the leading and chief conspirators therein; that in the truth, as your oratrix is informed, believes, and charges, the said several possessors who thus held title from said City of New Orleans and First Municipality to the said several tracts and parcels of land at and during most of the time of their possession, and especially since the final judgment of the Supreme Court of the United States in the case of Gaines *vs.* Hennen, rendered at the December term, 1860, would have surrendered the same to oratrix had the said City of New Orleans consented to refund and pay said possessors the respective prices which said city and First Municipality sold said property and relieve them by payment to oratrix of their said respective obligations for fruits, revenues, and value for use; and the refusal of said city to thus discharge her obligation in warranty, and her said persistent demand that said possessors should resist the just demands of your oratrix, constituted in the main the moving and active cause of their said resistance, and thereby the said city became the chief actor therein; and
80 all of which foregoing acts and doings of the said City of New Orleans rendered said city in equity responsible *in solido* with said respective and several illegal possessors unto your oratrix for all said fruits, revenues, and value for use.

XIV. And your oratrix further shows that since the rendition of said final judgments in suits 3663, 6085 the said defendants have demanded of said City of New Orleans to enter into arrangement with your oratrix for the quieting of said defendants' title and possession of the respective portions of the property which they held under full warranty of title from said City of New Orleans and First Municipality, or to pay to them respectively, for the use and benefit of your oratrix, the prices which said City of New Orleans and First Municipality received therefor, and to settle and pay to your oratrix

the respective judgments which, on fruits, revenues, and value for use, have been or may be rendered against them.

XV. And your oratrix further shows that none of the said judgments for fruits, revenues, and value for use rendered in favor
81 of oratrix against said defendants in suits Nos. 3663, 6085, as set forth in Schedule "C," have been paid in whole or in part, and still remains due to oratrix, and that said defendants are unable to pay the same, except it be through payment by the City of New Orleans in discharge of her said obligations in warranty, and which payments said defendants as aforesaid have demanded of said city to make to your oratrix.

XVI. But now, so it may please your honors, the said def't, The City of New Orleans, to injure & oppress your oratrix, now absolutely refuses to pay or account to her for the rents, revenues, and value for use of said property since the time said def't came into the illegal & fraudulent possession of it on the 21st September, 1834, or the interest thereon or any portion thereof, some time pretending that no actual revenues were derived from the same by said defendant or others who acquired illegal possession of respective portions thereof from and through the illegal and fraudulent acts and doings of said defendant, and therefore none are to be accounted for, notwithstanding such non-reception of revenues was owing to
82 the fact that said illegal and fraudulent possessors did not manage the said property with ordinary prudence, and said property therefore did not produce the income which by ordinary good management oratrix could have caused the said property to produce had she been left in the undisturbed possession of the same, and which said disturbance, as oratrix has heretofore charged and now reiterates, was owing to the aforesaid illegal and fraudulent acts and doings of said defendant, at other times pretending that said defendant under no circumstances is liable to account to oratrix for said fruits, revenues, and value for use during any portion of the time subsequent to the said pretended illegal and fraudulent acts of sale by said City of New Orleans and First Municipality to divers persons, as in this bill heretofore set forth.

Whereas your oratrix expressly charges the contrary to all these pretences to be true, and that said City of New Orleans by her said acts and doings, and also as trustee, is responsible to your oratrix and bound to account for the amount, with annual inter-
83 est of the fruits, revenues and value, for use of all said property so recovered by your oratrix by her said final judgment from the commencement of the illegal and fraudulent possession acquired by the city of New Orleans from Evariste Blanc through the pretended sale before Philip Pedesclaux, notary, on the 26th Sept'r, 1834, to the respective dates, at which the respective squares and lots into which said property is divided were, or shall be, surrendered to the quiet possession of oratrix, including not only the amount of fruits and revenues which may have actually been received by said city of New Orleans, and first municipality, and their said subsequent illegal vendees, but such amount as might have been realized by ordinary good management, and such as your oratrix

could have caused said property to produce had she been in the peaceable possession thereof, excepting therein the certain square known as forty-six, and that in the taking of said account the use of the sums received and enjoyed by said city of New Orleans
84 and First Municipality as price of said property be considered, as also from revenues derivable from any of the various uses and dispositions of property, as from investment of its price from ground rent, from lease, from cultivation, or any other matter. In consideration whereof, and inasmuch as your oratrix is without remedy at and by the strict rules of the common law, and is relievable only in a court of equity, where matters of this nature are properly cognizable and relievable, to the end, therefore that the said defendant, the City of New Orleans, may, if she can, show cause why your oratrix should not have the relief hereby prayed, and may, according to the best and utmost of her knowledge, remembrance, information, and belief, full, true, perfect, and distinct answer make, but not under oath, her oath thereto being expressly waived to the said interogatories hereinafter numbered and set forth, and that she answer, all and singular, the matters and charges aforesaid, as fully and particularly, in every respect, as if the same were here again repeated, and she thereunto particularly interrogated.

85 And that said defendant may be decreed to make full discovery of the matters and things herein set forth, and to come to an account with your oratrix, to be taken by and under the direction and decree of this honorable court, of the fruits, revenues, profits, and value for use of said property since the 21st of September, 1834, and to pay over to your oratrix whatever shall be found due by said defendant upon the taking of said account; and that said account include not only the amounts of fruits, revenues, and value for use actually derived and received from said property, but likewise such fruits, revenues, and value for use which could have been derived from the same by ordinary good management had she been left in the quiet possession of said property; and, further, that said account include the fruits, revenues, and value for use of said property during the period from said 21st September, 1834, to the said respective dates when said City of New Orleans and First Municipality passed said illegal acts of sale of portions of the
86 same to other parties, as also the fruits, revenues, and value for use of said property from the dates of said respective sales to said other parties, pretended purchasers who then and there took possession of respective portions thereof by the will, desire, consent, and fraudulent acts of said City of New Orleans and First Municipality up to the time and times when said respective purchasers or their said vendees surrendered or shall surrender the possession of the same to your oratrix; and that said City of New Orleans be held and decreed bound and indebted for the same to oratrix *in solido* with said respective other and subsequent possessors, and that the several judgments for fruits, revenues, and value for use rendered and to be rendered against the several defendants in said suits Nos. 3663, 6085, as set forth in schedule C, be held as the basis for said account with the defendant, the City of New Orleans,

during the time covered by said judgments; and that the said final judgments rendered in said suits Nos. 2695, 3663, and 6085, as to each and every issue of law and fact adjudged therein, be
87 held as *res adjudicata*, and as things finally adjudged against this defendant, the City of New Orleans.

And may it please your honors to grant unto your oratrix the writ of subpœna, in due form of law, to be directed to the said defendant, the City of New Orleans, commanding here by a certain day, and under a certain penalty therein to be inserted, to be and appear before this honorable court, and then and there to answer the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as shall be agreable to equity and good conscience, and as to your honors shall seem meet.

And your oratrix, as in duty bound, ever prays, etc.

(Signed) WM. REED MILLS, *Solicitor*.

NOTE.—The defendant, the City of New Orleans, through the mayor of said city, is required to answer the following and annexed interrogatories, numbered one, two, three, and four:

Interrogatory 1st. State the sales made by the City of New Orleans and First Municipality, by squares and lots, of the
88 property set forth in this bill as purchased by the City of New Orleans from Evariste Blanc, by notarial act of sale, before F. D'Armas, notary, on 26th day of September, 1834, and the respective dates, description of squares and lots, and prices of said sales.

Interrogatory 2d. State the names of the solicitors employed by the City of New Orleans since the year 1865, and the times and conditions of said employment, as attorneys and solicitors, in the suits of Joseph Fuentes *et als. vs.* Myra Clark Gaines, No. 32979 of the docket of the second district court for the parish of Orleans, and Myra Clark Gaines *vs.* P. H. Monsseaux *et als.*, No. 3663, and Myra Clark Gaines *vs.* P. F. Agnelly *et als.*, No. 6085, of the United States circuit court, fifth circuit, and district of Louisiana.

Interrogatory 3d. State what, if any, petitions have been addressed to the council of the City of New Orleans by any of the various purchasers of property so sold, as referred to in the above 1st interrogatory, and please annex to your answer true certified copies of
89 said petitions and of the official proceedings had thereon.

Interrogatory 4th. State the amounts, if any, paid by the City of New Orleans, on account of professional services in said three suits mentioned in interrogatory two and the dates of such payment.

90 *Amended Bill in Suit No. 8825. Filed with leave of Court May 6, 1880, and referred to and made part of the foregoing Bill of Exceptions.*

United States Circuit Court, Fifth Circuit and District of Louisiana

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS } No. 8825.

To the honorable the judges of the said circuit court.

And now, your oratrix, Myra Clark Gains, under leave of court, granted by way of amendment to her bill in chancery depending herein against the City of New Orleans, and thereupon complains and says:

That said defendant at times, and as in her answer to plaintiff's original bill set forth, pretends that the final judgments heretofore rendered by the Supreme Court of the United States, and by this court, in the case of your oratrix against said City of New Orleans, one of the defendants in the case of Myra Clark Gaines *vs.* The City of New Orleans *et al.*, No. 2695 of the docket of this court, are a defence to the present action of oratrix against said defendant.

91 Whereas your oratrix expressly charges the contrary to all such pretences to be true, and that the demands adjudicated in said suit No. 2695 in favor of oratrix and against said defendant were different and distinct from the demand herein set up and judgment asked for by oratrix against said defendant.

That the right of action and claim of oratrix in said suit No. 2695 were substantially the recovery of possession of such portions which defendant might, at the institution of said suit, be in possession of the certain tract of land which belonged to Daniel Clark at the time of his death, and has been illegally sold, and possession given by Chew and Relf, executors, &c., to Evariste Blanc, on the 21st December, 1820, and illegally sold to and possessed by said defendant through a pretended sale from said Evariste Blanc, on the 21st September, 1834, as also for the recovery of the rents and revenues which said City of New Orleans has derived from any portion of said property while in her possession, and did not include the fruits, revenues, and

92 value for use derived, or derivable from, said property by said subsequent possessors and purchasers thereof from said defendant, and which substantially is the demand and right of action claimed against defendant in her present bill of complaint. At other times, as by said defendant's answer averred, said defendant pretends that your oratrix is not the legitimate child and universal legatee of her father, Daniel Clark; that said Daniel Clark never executed and left at his death the will of 1813, as in oratrix's bill alleged; and at other times, that oratrix has waived and abandoned her rights as heir and universal legatee, under said will of 1813, to the extent as to deprive her of any right of action as heir and universal legatee under said will; at other times, that said Daniel Clark was not the owner at his death of the property set forth in oratrix's original bill; that a certain will executed by Daniel Clark in the

year 1811 was his last will and testament; that said Daniel
93 Clark died insolvent; that defendant acquired possession of said property from Evariste Blanc in good faith, whereas your oratrix expressly charges the contrary of all their various pretences to be true, and were so finally determined and adjudged by the final judgments rendered by the Supreme Court and by this court in the said case, No. 2695, whenever the said same issues were raised by said defendant, and adjudged in favor of oratrix and adversely to said defendant.

At other times, and as averred in her said answer, defendant pretends to have been ignorant of all proceedings had in the said suits of Myra Clark Gaines *vs.* P. H. Monsseau *et als.*, of Myra Clark Gaines *vs.* P. F. Agnelly *et als.*, Nos. 3663, 6085 of the docket of this court, and that said suits were collusively and fraudulently carried on and judgment by oratrix obtained against those defendants, who either directly or through other and by forms of mesne conveyances obtained from said defendant possession of respective parties of said property.

94 Whereas the contrary of all such pretences your oratrix charges to be true, and that said defendant was not only at the time aware of the institution of said suits, but employed and paid special counsel to represent and defend all and singular said defendants in each and every matter deemed by said counsel best adapted to resist the just demands of your oratrix; that, as shown by the records and proceedings in said suit, the said counsel admitted, in the answer of defendant to the interrogatories propounded in complainant's original bill, to have been employed, took the active and direct management of all the defences of said defendant, including not only the preparation of the pleadings on their behalf, the taking of evidence, the arguments before the court, regarding as well executions of title, and all matters pending before the master regarding fruits, revenues, value for use, and improvements, but also in other proceedings claimed by said defendants, and her said solicitors advisable for, and calculated to prolong the defence of said defendants, and resistance of the just rights of your oratrix.

And [your] oratrix specially charges to be true, that said
95 counsel, so acting as legal advisers of said City of New Orleans in said premises, advised and procured the institution of said suit of Joseph Fuentes *et al. vs.* Myra Clark Gaines, No. 32979, of the docket of the second district court; advised and induced the said defendants, in suits Nos. 3663 and 6085, of the docket of this court, to allow the use of their names, & to join as plaintiffs therein; advised them that unless they should do so, and also resist the said claim of your oratrix, and allow their said counsel to plead such defences, and resort to such means against oratrix as they deemed advisable, said defendants would loose and forfeit in case of eviction all their rights and actions of warranty against said City of New Orleans.

That while said defendant refuses to state, agreeable to oratrix's request in her original bill, the conditions of said employment of said counsel and solicitors by said defendant, yet oratrix believes,

and so charges the truth to be, that the conditions of said employment included the full and entire defence of each and every
96 of said defendants in said suits 3663 & 6085, in possession of any portion of said property known, and in these proceedings designated, as the "Blanc tract."

And oratrix, by way of amendment, and notwithstanding the demise of said defendant, says that she has reason to believe, and therefore so charges:

That other application of said defendants in suits Nos. 3663 & 6085 to said City of New Orleans for relief were made than that annexed as Document B to defendant's answer to 3d interrogatory.

That some time, on or about the month of May, 1870, such an application was made by over two hundred of such possessors, the original of which should be in possession of defendant.

That at divers times said defendants have by personal appeals and demands, directly and through others, on the mayor, alderman, and administrators, and the said solicitors so employed sought to have their said written requests for settlement with oratrix complied with.

That at least many of said parties, defendants in said
97 suits Nos. 3663 & 6085 have ever reluctantly consented to the demands of said City of New Orleans to the disastrous defences required to be made to the just claims of oratrix.

At other times, as by said answer averred, defendant pretends that she has not at any time done or committed any illegal or fraudulent act about or concerning that portion of property described in oratrix's original bill, or has had any dishonest or fraudulent dealings in regard thereto since she parted with the possession of said respective parts and parcels of said property to said other persons, and that at the time the same was so divided and sold said defendant had no belief, knowledge, or suspicion that the said complainant had or could assert any claim or title to said property or any portion thereof.

Whereas your oratrix charges the contrary of all such pretences to be true, and that said defendant in 1837 by public vendue and by notarial acts sold and surrendered possession of the same to said
98 defendants in suits Nos. 3663 and 6085, or their vendors, or vendors of their vendors, for an aggregate price, as oratrix is informed and so charges, of over four hundred thousand dollars, and that previous to said sales and surrender of possession your oratrix had filed her bill in equity known as said suit No. 122 against said defendant, claiming ownership and right of possession of said property, and whereby said defendant was made aware of the claim of oratrix as owner thereof, and this much the adjudged fact of said defendant's ownership of oratrix's ownership before and at the time said defendant obtained and took possession of said property on the 26th September, 1834, from said Evariste Blanc.

In consideration whereof, and to the end, therefore, that the said defendant may, upon her corporal oath, according to the best and utmost of her knowledge, remembrance, information, and belief, full discovery and true answer make to the matters and charges in this

amended bill set forth as fully and particularly as if the same
99 were here again reported and she thereunto particularly interrogated, and show cause, if she can, why your oratrix should not have the relief as in her original bill fully claimed and set forth; and that your oratrix prays that she may have the relief as prayed for in her said original bill of complaint, and that a writ of subpœna in due form of law issue, to be directed, with a copy of this amended bill, to the said defendant, commanding her, by a certain day and under a certain penalty therein to be inserted, to appear and answer in the premises this amended bill, and, further, to stand to, perform, and abide [by] such further order, direction, and decree therein as shall be agreeable to equity and good conscience and as to your honors shall seem meet.

And your oratrix will, as in duty bound, ever pray, etc.

(Signed) WM. REED MILLS, *Solicitor.*

Answer of the City of New Orleans, Referred to and Made Part of the Foregoing Bill of Exceptions.

100 United States Circuit Court, District of Louisiana.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 8825.

The answer of the City of New Orleans, defendant in the above-styled cause, to the bill of complaint of Myra Clark Gaines, complainant.

This defendant, now and at all times hereafter, saving to herself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for her to make answer to, answering, saith:

The defendant admits that the said Daniel Clark departed this life on or about the 16th day of August, 1813. Said defendant is not advised, excepting by said bill, whether at the time of his death he was lawfully seized of the property described in said bill, but is advised, informed, and believes that at the time of his death he was in an insolvent condition.

101 Said defendant, further answering, saith that, from information and belief, she denies that the said Daniel Clark on or about the 13th day of July, 1813, or at any other time, did make and execute and publish a last will and testament in writing of the character and description and import of the alleged and pretended testament set forth and described in said complainant's bill of complaint.

And, further answering, said defendant saith that she denies that the whole of the estate of the said Daniel Clark or any part thereof, either by the laws of the State of Louisiana or by the effect of said alleged will, vested in the said complainant on the death of the said testator, or at any other time.

And, further answering, the said defendant saith that the said Daniel Clark did in the year 1811 make a will, his last will and testament, in which he made his mother, Mary Clark, his universal legatee, and Richard Relf and Beverly Chew his executors,
102 and that said will of 1811 was probated in the City of New Orleans; that said Relf and Chew qualified as executors, but deny that the said will was in any manner provisional in character, but avers and alleges that the same was in all things valid, and was and is the last will and testament of the said Daniel Clark, and denies that the same was ever revoked in any particular or by any means.

And, further answering, said defendant saith that it is not true that the said complainant did not become of age or reach the age of twenty-one years until the 31st day of December, 1827, but that the truth is that she reached her majority in the full age of twenty-one on or about the first day of August, 1825.

And, further answering, said defendant saith that it is advised and informed that until long after the year 1832 one Zuliene Carriere, whom the said defendant alleges to be complainant's mother, was still alive, and that she continued to live until some time in
103 the year 1853, and that the said alleged mother of the said complainant was in all things well aware of the exact relation that she had at any time held to and with the said Daniel Clark, and was also well aware of the existence, residence, and whereabouts of the said complainant, and had frequent communication with the said complainant during all of said period; and that the said complainant was at all times well aware of her history, her parentage, and that as early as 1830 she was in all things well aware of the same and in no respect in ignorance thereof.

And, further answering, the said defendant admits that in the month of July, 1836, the said complainant, joining with her then husband, one W. W. Whitney, did institute a suit in the district court of the United States for the eastern district of Louisiana, and that said suit was numbered on the docket thereof 122, and saith that in said suit the said complainant did attempt to set up the said pretended will of 1813, and did also pretend to claim of this de-
104 fendant and the other defendants in said bill various and sundry property belonging to the said Daniel Clark at the date of his death by virtue of her pretended heirship at law of the said Daniel Clark.

That said bill was demurred to by the defendants, and, on a division of opinion between the judges of the circuit court, was carried to the Supreme Court of the United States, which Supreme Court held that the complainant could not set up the said pretended will of 1813 until the same should be proved in the probate court of the State of Louisiana.

That by subsequent amendments to the said bill, and in consequence thereof and of the said decision of the Supreme Court of the United States, the said complainant did, for the purpose of making her suit good as heir-at-law, specifically renounce all right, title, and interest and claim under and by virtue of the said pretended will of

1813, and did elect to stand upon her pretended rights as transferee of the said Zulime Carriere to one-half of the property left by
105 the said Daniel Clark on the pretence that the said Zulieme Carriere had been his lawful wife and was his widow in community.

That in the said amendments she confined her claim specifically to one-half of the said property as transferee of the said pretended widow in community, and to four-fifths of the other half as the forced heir of the said Daniel Clark, and did voluntarily abandon and release to the defendants the remaining one-fifth of the said property possessed by them and sued for by the complainant and obtained by them through lawful titles from the said Mary Clark, the mother of Daniel Clark, the same being the property described in this bill of complaint, and forever abandoned all claim thereto, and that the said property, described in the said last-mentioned bill of complaint, was and is the identical property described and set forth in her said bill complaint herein.

And the defendant saith that at the time of the filing and exhibiting of said bill of complaint in suit No. 122 the said com-
106 plainant was of full age and had been for more than ten years then last past. That she was under coverture of the said W. W. Whitney, who joined her in the said action, but in all things she acted with his full consent and authorization, and was and is in all things bound, held, and estopped by her said election and her said *remuneration* of any right or title which she had before that time pretended to have accrued to her under and by virtue of the said pretended will of 1813.

That the said bill and amended bill answer was filed by this defendant and issue taken therein in due form and a final decree rendered therein, after due and regular hearing, dismissing said complainant's bill & amended bills, and rejecting her claim as heir-at-law of the said Daniel Clark; and, as set up in said bill, that from said decree the said complainant, duly authorized and assisted by her then husband, E. P. Gaines, prosecuted an appeal to the Supreme Court of the United States in due form; that in said appeal
107 she was cast, and said decree was, in all respects, affirmed, with costs, as will more fully appear by the record No. 122, hereto annexed and made part of this answer for reference and proof, and marked "Exhibit *A*."

Wherefore, and by reason whereof, the said defendant, now and at all times, insists that the said complainant was and is in all things barred and estopped from setting up, pleading, or in *in* any form urging against this defendant any right, title, or claim to disturb the said defendant in its title and right, not only to the said portion of the said property specifically abandoned to the said def't in said bill of complaint, but also from in any manner setting up, urging, or claiming to have or to have acquired any right, title, or claim to evict or disturb the said defendant of the possession and title of any of the balance of said property, or to call upon or demand of and from the defendant in any manner, form, or proceeding any account or demand for rents or profits growing out of or arising from

any claim or pretended right or title accruing to her through, under, or by any provision, condition, or grant, or bequest in said alleged will of 1813, referred to in her said bill of complaint herein.

108 And said defendant insists upon the same as a defense herein.

And further answering said defendant saith:

That it is also true, as alleged in the complainant's bill of complaint, that said complainant did, on the 22d day of September, exhibit her bill of complaint, known as No. 2695 on the docket of this court, against this defendant and certain other defendants, in which said complainant sought to recover from this defendant the tract of land set forth in said bill, No. 122, and also set forth in the complainant's bill of complaint in this cause, and in which she also claimed from this defendant the fruits and revenues of said land from the 26th day of September, 1834, down to the day of delivery, and in which she also claimed to hold this defendant as her trustee for the said land, and for the rents and profits thereof from the date when they acquired the same from Evariste Blanc, by act before P. Pedescleaux, notary public, on the 26th day of September, 1834, down to the day of delivery.

109 And in said last-mentioned bill of complaint the said complainant did, in all things, claim and demand of and from the said defendant all and all manner of rents, profits, rights, claims, and demands which she hath in her said bill of complaint herein again demanded of and from the said defendant.

That this defendant joined issue on the said bill in due form of law, and her right to have and obtain of and from the said defendant was, in said bill of complaint, in all things, put at issue and litigated in every respect and particular, and to the full extent thereof, both as claimed in said bill of complaint in said case No. 2695 as well as set forth and claimed in this her said bill of complaint, as appears by the said complainant's exhibits herein.

That, after due proceedings had, a final decree was therein rendered between the said complainant and this defendant, wherein and whereby it was adjudged that her bill should, in all respects, stand dismissed without reservation, with costs.

110 That from said decree said complainant prosecuted an appeal to the Supreme Court of the United States.

That after hearing thereof the said Supreme Court reversed the said decree of the circuit court, and remanded the cause to the circuit court, with direction to enter a decree in favor of the plaintiff. But when the mandate of the Supreme Court in said case was returned to the said circuit court proceedings were had in said cause, under the authority of said mandate, to settle and determine the decree to which the said complainant became entitled by the judgment and decree of the said Supreme Court.

That the decree and determination of the said Supreme Court was such that the said circuit court then and there became vested with the power and authority, and was required, to settle, adjust, and determine all and singular every claim and demand and question in the said bill of complaint set forth and averred wherein and where-

by the said complainant therein had or could have any right,
111 claim, or demand against the said defendant for the said property described in said bill, as well as all claims for rents, profits, and damages to which the said complainant became entitled or ought to recover from the said defendant by reason of the decreed right of the said complainant to said property and the possession thereof, or growing out of the decreed illegal possession and claim to the title thereof which had in said suit been set up and insisted upon by the said defendant as a defense against the said claim of the said complainant therein.

That the said decree of the said circuit court in said cause rendered is in all things of record in this court in said cause No. 2695, and was in said cause made and entered by the court after full consideration, adjustment, and determination of all the rights insisted upon, claimed, and put in litigation in said action by the said complainant.

That said defendant refers to the said decree, as recorded and engrossed on the records of this court in said cause, for the terms,
112 conditions, and extent thereof.

That in and by the terms of said decree said cause was referred to a master in chancery in this court to take proof examined, hear and determine the full amount and extent of a decree which of right ought to be entered in said cause against this defendant, and in favor of the said complainant for and on account of each every and all the claims and demands set forth in said bill of complaint for damage growing out of the withholding of the possession of the said property from the said defendant as well as all rents and profits to which the said complainant was or ought to be entitled to recover from the said defendant, by reason of any of the matters set forth and contained in the said bill of complaint.

That, in accordance with the terms and directions of said decree, proceedings in due form to that end were had before John B.
113 Weller, then being a master in chancery of this court to whom said matter was referred by the terms of said decrees.

That after due and proper proceedings, had before said master, the said master did, in the due course of proceedings in the said cause, determine and ascertain the said sum to be one hundred and twenty-five thousand two hundred and sixty-six ($125,266.79) and did in due form make his report thereof to said court.

That exceptions to said report were taken, filed, heard and determined.

That said report, in due form, confirmed for the last-mentioned sum of money.

That the said defendant, feeling aggrieved thereby, prosecuted an appeal therefrom to the Supreme Court of the United States, where in due course, and after due proceedings had, the said decree of the circuit court, confirming the said report of the master and decreeing that said defendants pay to the said complainants said sum
114 of money named in said report was in all things affirmed and became final, and that the said defendant, having no other redress in the premises, paid and satisfied the said decree in

all respects long prior to the exhibition of the said complainant's bill of complaint herein.

And the said defendant saith that the said complainant in no manner complained of the said decree, prosecuted no appeal therefrom, but permitted and consented that the same should stand as a final adjudication and determination of all the matters and demands set forth by her said bill of complaint, and that the said final decree has at all times since the date thereof, and now does stand as a solemn and final adjudication and determination of all the matters and things which were or ought to have been, or could have been, adjudged, determined, and finally settled in and by said litigation.

Wherefore and by reason of the premises said defendant doth insist upon and pleads that the said complainant was, in all things, barred and estopped from setting up or prosecuting
115 again, and in this way said bill of complaint, for and because the same have, in all respects, been adjudged, determined, decreed, and passed upon in said action, to which she was complainant, and the said defendant wherein, all and singular the matters, pleaded in this, her said bill of complaint, were pleaded, averred, set forth, and issue thereon taken, and all matters of controversy settled and determined by final decree.

And the said defendant insists upon the same as a defense herein to the full extent and effect, as if the same had been fully and specially and formally pleaded herein, and claims the benefit thereof.

And further, answering, the said defendant saith:

That it is not advised, excepting by said complainant's bill of complaint whether the matters set forth in the 8th, 9th, and 10th subdivision of the complainant's bill of complain*ant* herein are true in manner and form, as therein set forth, or whether the said
116 alleged litigation therein set forth is correctly or truthfully aver ed and set forth, and therefore denies the same is true in manner and form as therein set forth.

That said defendant is advised and informed that, by reason of some proceedings had by the said complainant in this court, decrees of some form relating to some portions of the said property described in complainants' bill of complaint were had and obtained by the said complainant, of the precise character thereof this defendant is not informed, and demands strict proof thereof if the same becomes material herein. That said defendant is not informed of the full history and details of the said litigation of the said complainant, about concerning said property or that portion thereof which was not in the possession of the said def't at the time of said litigation, but is informed and believes that many of the said alleged decrees are absolutely null for the reason that they were begun, instituted and carried on against persons who had departed this life long before the attempted institution of said suit; and that the
117 legal representatives of such deceased persons, if they had any, were in no manner made parties to said litigations or advised thereof, many of them obtained *pro confesso*, and otherwise were collusive; and that very many of them are absolutely null for

want of service of subpœna or any other process upon the defendant.

That said defendants do not admit the validity or binding effect of any of said pretended decrees, but in all things demands strict proof concerning each and every of said pretended decrees, and that the same be established to be in all things valid decrees legally and honestly obtained before any effect is given to the same which may directly or indirectly affect this defendant in any manner.

And the said defendant, further answering, in answer to the matters set out in the 11th subdivision of the said bill of complaint, herein denies that it has at any time done or committed any illegal or fraudulent act about or concerning the said property
118 described in said bill of complainant or has ever had any dishonest or fraudulent dealings in respect thereto, and that the averment in said bill of complaint that the said defendant has done or committed any fraudulent act as false and untrue. That this defendant specially denies that it ever obtained possession of said property or any portion thereof through or by means of any fraudulent act or transaction, or that there was any fraud in the act of purchasing said property from the said Evariste Blanc on the 26th day of of September, 1834, and specially denies that it ever had either at that time or at any time since any belief that the said complainant ever had any right, title, or interest therein, or to any part thereof, or that it ever doubted either at the time of the sale or at any time since, that the said Evariste Blanc had full, absolute, and legal right and title to said property with the full, absolute, and complete right to transfer the same by conveyance to said defendant, and denies that it in any respect acted in bad faith in acquiring said
119 property. That if the said defendant had at any time supposed or believed that the said complainant had any right or title therein it would never have acquired or purchased the same as the said complainant well knows, and knew at the time of the exhibition of her said bill herein.

That the said defendant acquired said property by purchase from Evariste Blanc in the full belief that it acquired an absolute fee-simple title thereto, and that having said title they had the full right and authority to convey and dispose of the same.

That it was while possessed of said belief that it caused the same to be platted and divided into blocks and lots in the years 1836 and 1847, and exposed the same for sale at public auction in an open and public manner; that said property was not at that time required for any public or municipal use; that the same was not the source of any revenue to the said city while it held the same in title; that it was in fact a cypress swamp, to reclaim which would require the expenditure of a large amount of money and
120 could only be accomplished by individual owners of the property who were willing to expend large sums of money to redeem the same.

And the said defendant specially denies that the said subdivision of said property into lots and the sale thereof was made with any intention or belief that it would in any way hinder, obstruct, or de-

lay the said complainant in any legal proceedings or other means which she might adopt to assert a title thereto; and saith that at the time the same was so divided and sold, the said defendant had no belief, knowledge, or suspicion that the said complainant had or could assert any claim or title to said property or any portion thereof.

And, further answering, said defendant saith that it is not true that said defendant ever received the sum of four hundred thousand dollars as the price of the property sold by said defendant, and included in the said property described in said bill of complaint.

121 That the property sold at public auction by the said def't in the years 1836 and 1847, were subdivisions of the property known as the Blanc tract.

That it is not true that all of said property was acquired from the representatives of Daniel Clark, either his executors, or his said mother as heir.

That the said Blanc tract consisted not only of the property acquired by the said Evariste Blanc from the said Chew and Relf, as the agents and attorneys-in-fact of the said Mary Clark, but that a large portion of said tract was acquired by the said Blanc from other sources, and is property which it is not pretended the said Daniel Clark ever died seized of. That a portion of said tract not coming to the said Evariste Blanc from the succession of Daniel Clark constituted a large portion of the tract known as the "Blanc tract."

That the entire proceeds of the sale of lots on said "Blanc tract," including as well lots situated on that portion of the Blanc tract acquired by the said Blanc by purchase from Chew & Relf,

122 as agents and attorneys-in-fact of the said Mary Clark, heir of Daniel Clark, as the lots situated on the other portion of said "Blanc tract," to which the said complainant never had any claim, did not amount in the gross to a sum exceeding the sum of one hundred and twenty-six thousand dollars, and that the largest portion of the said sum was derived from the sale of property in said "Blanc tract," to which the complainant never had or asserted any claim.

That said defendant is unable at this time to state the exact portion of said last-mentioned sum of money which was derived from the sale of lots situated on property claimed by the said complainant, but aver and believe that the same did not exceed the amount of forty thousand dollars.

That the precise portion of said money derived from the sale of lots to which the said complainants lay-claim cannot be determined without a careful and accurate resurvey of said tract in order that the line between the said portion of the "Blanc tract" derived

123 from the succession of Daniel Clark may be separated and set apart from that portion of the "Blanc tract" to which said plaintiff never had any claim, and the lots and parts of lots situated on that portion of the "Blanc tract" derived from the succession of Daniel Clark be definitely ascertained.

And, further answering, the said defendant saith that as to all and

singular the matters set forth and contained in the 12th subdivision of said bill of complaint this defendant hath no knowledge, information, and belief concerning the same, and hath no means of knowledge thereof, and doth deny that any of the said matters and allegations contained in said subdivision are true, and doth deny as well all of the averments of fact in said subdivisions set forth as the conclusions of law therein by said plaintiff set forth.

And, further answering, the said defendant saith that all of the allegations of fact and alleged conclusions of law set forth
124 and contained in the 13th subdivision of said plaintiff's bill of complaint are untrue in all respects and particulars.

And, further answering, defendant saith that it is true, as it is informed and verily believes, that at all times since the institution and determination of the case of Gaines *vs.* Hennen referred to in said subdivision it has been notorious, and believed by all persons in the City of New Orleans where said property is situated, that the institution and prosecution of said suit was a fraud upon the courts; that it was instituted against the said Hennen only after a fraudulent and illegal compact had been entered into between the said complainant and the — Hennen, by which it was agreed that the said Hennen should collusively consent to a decree to be rendered against him, the said Hennen, in said cause, and that said Hennen, before he consented to the same, obtained from the said complainant full and complete indemnity against any loss or damage or let or hindrance growing out of said decree, and that it was also well
125 known that the said Hennen had absolutely failed in the effort to enforce the warranty clause of the conveyance of said property to him for the reason that he was unable to convince the jury that said decree was honest, and that said decree in the case of Gaines *vs.* Hennen, instead of impressing parties in interest with the belief that the claim of the said complainant to said property was an honest claim and ought to prevail, had the contrary effect to induce persons who had interest to believe that her claim was in fact fraudulent, and could only be asserted by fraudulent and collusive means, and said defendants aver that it is not true that by reason of the proceedings and decree in the case of Gaines *vs.* Hennen any person was induced to believe that her pretended title was good and valid reason sought to settle with or surrender their property to the said complainant.

And, further answering, said defendant saith that is in-
126 formed and believes that the matters alleged and set forth in the 15th section or subdivision of said bill of complaint are untrue, and denies the same as therein set forth; that all of the acts of the said complainant are not known to this defendant, but that this defendant is informed and believes, and therefore avers, that a large number of the supposed decrees and judgments referred to in said Schedule C are void for want of any service of process on the defendants therein named, and for the reason that the supposed defendants were dead at the time of the institution and determination of said suits; that a large portion of said pretended judgments, if otherwise valid, relate to property never in the possession of this de-

fendant, and for which this defendant never executed any conveyance to any person; that the defendants in a large number of said cases, hopeless of any legal redress, have paid and settled the said pretended demands of said complainant, and that said judgments are fully satisfied; that a large number of said supposed decrees
127 were obtained by fraud and collusion between the said complainant and the defendants named therein, and that by a fraudulent agreement, and with the intent to injure and defraud this defendant, decrees *pro confesso* were allowed to be taken and pass into final decrees; that in other cases where the defendants believed that, by reason of the depreciation of property in value, the same was not at the time of the said supposed decree worth the sum for which said persons believed this defendant bound in warranty in case of eviction, the said complainant, and said persons against whom she was proceeding, fraudulently agreed to decrees of eviction, and for exorbitant sums as pretended rents and profits, with the understanding that the same decrees should not be enforced against the defendants in said decrees, but used as the basis of a fraudulent demand against this defendant; that in all such cases this defendant is in no manner bound in warranty to any of the parties to said frauds.

That the pretence of said complainant that she has now, or
128 at any time has had, any claim or right in and to, or could claim the benefit of any clause or condition of warranty contained in any conveyance of any of said property, or could enforce the same in her own interest and for her profit, is false and untrue, and without foundation in fact or law.

And said defendant saith that it is advised and informed and believes that all of the persons to whom this defendant ever in any form warranted title to any of said property acquired of said Blanc were, and are, citizens of, and, while living, resided in the State of, Louisiana, and that those persons named in said Schedule C, whom it is pretended are warranted in title by this defendant, and are still alive, still are citizens of, and reside in, this State, and that as to each and all thereof they could not enforce any of said supposed contracts of warranty in this court, and that said complainant cannot, and has not, any assignment of said contracts, either by convention or by operation of any law which can or does vest this
129 court with jurisdiction to enforce the same in this court, this court at all times being without jurisdiction to entertain any action therein between the real parties to said contracts; that as to some of said supposed contracts of warranty the said defendant is forever released and discharged.

And, further answering, said defendant saith that it is informed and believes that the said complainant has, before the filing of this bill, had sold and transferred all of her pretended title in and to all of said judgment and decree, and all right of action against this defendant growing out of said judgments and decrees, and all the supposed right of action growing out of all of the matters set forth in her said bill herein to third persons, whose names are to the defendant unknown, and had and has no title or interest therein, and has

no right of action in any form based thereon, or by the acts and conduct of the said persons supposed to be warrantees in said supposed contracts.

That in other cases said defendant has a full and complete
130 legal defense against any demand based on said supposed covenant of warranty if the same was set up by the supposed warrantee.

That the averment and pretence that said persons claiming to hold obligations of warranty against this defendant have demanded or requested that this defendant discharge said supposed obligations in warranty by payments to said complainant is in all things and respects false and untrue as said complainant at all times well knew and knows, and if the same had been demanded would in no manner create any obligation on the part of this defendant to comply therewith or in any manner affect any right of compliance or confer any right, demand, or right of action on said complainant.

That it is true that in the said suit of complainant's against this defendant referred to in said bill of complaint as No. 2695, she obtained a final decree against this defendant for all of the rents, profits, and other charges which in the judgment of this court said complainant could recover or ought to recover of and from said
131 defendant by reason of its acts in purchasing, holding, and selling said property described in the bill of complaint, and that after this defendant had exhausted all legal means of resistance against the same, but all times impressed with the injustice of said decree paid in full said decree, and that the same is in all things paid and satisfied. That said allegations in said bill that said defendant has paid no sum for rents and revenues of said property is for that reason false and untrue, as said complainant well knew when she made said allegation.

And, further answering, said defendant saith that the pretence of said complainant that had she been in possession of said property from the 21st of Sept'r, 1834, she would have realized large revenues therefrom is false and untrue. That it is a notorious fact well known to the said complainant that from said last-mentioned date up to and long after the date of the sale by the said defendant of the lots sold out on that portion of the said Blanc tract claimed by
132 complainant the said land and all of it was a wild cypress swamp in all things uninhabitable and unfit for any use whatsoever. That it was only by the expenditure of a sum of money exceeding the total value of all of said property by the sum of over one and one-half million dollars in ditches, canals, embankments, and draining that those persons to whom defendant sold said property could enter upon the same to improve the same, or that the same became inhabitable in any respects. That of said sum of money so expended said complainant never to the knowledge of the defendant contributed one dollar.

That but for the large expenditures so made by said defendant, said property, and all parts thereof, would have at all times been the home of the alligator, and unproductive of any revenue, and unfit for a place of residence for any wild beasts not aquatic; that the

money expended by said defendant in reclaiming said land and in protecting the same from inundation has by far exceeded the greatest possible sum which could have been realized from said
133 property by any possible providence or enterprise in the management thereof; that the averment in said bill of complaint that said defendant ought to have received large profits from a proper management of said property is false and untrue; that it is also false and untrue that those to whom said defendant sold said property ought to have received larger profits than is decreed against them by complainant's own showing; that it is untrue that said complainant could have realized any profit had she been in possession of said property from the date of her pretended title thereto; said defendant again repeats that if it had not expended a sum greater than the total present value of said property in reclaiming the same, and the said property, had defendant been able to pay the taxes due thereon, would have remained on her hands until this day a worthless, unimproveable cypress swamp, productive of no revenue whatsoever.

And, further answering, said defendant saith that as to all and singular each and every charge, averment, statement, or alle-
134 gation of either fact or conclusion of law in said bill of complaint pleaded, contained, or set forth not herein specially denied or confessed and avoided, said defendant saith that the same and each of them are false and untrue, and that each and every conclusion of law set forth in said bill of complaiat is untrue, incorrect, and false, as set forth.

And, further answering, said defendant saith that as to all of the supposed and alleged wrongs, torts, offences, and *quasi* offenses and crimes which said complainant hath charged against said defendant and alleged that said defendant hath committed against her and her said supposed rights; that if said supposed torts, wrongs, crimes, trespasses, offenses, and wrongs were committed as in said bill alleged, the same were done and committed, each and all thereof, more than one year prior to the filing and exhibition of this her bill of complaint herein, and the service of subpœna therein on said defendant, and that by force of the statute of the State of
135 Louisiana, then and at that time and still in full force and effect, and all right of action therein, and all and any right of action or recovery by reason thereof, was and is barred and prescribed against, and said defendant had at and before the date when said bill of complaint herein was filed acquired full and complete prescription from and against all and singular the said supposed torts, offenses, and *quasi* offenses set forth and charged in said bill of complaint, and said defendant as to all and singular said matters plead the prescription of one year as ordained in said statute of the State of Louisiana in such case made and provided in bar to all said matters and all damages or consequences which have resulted, may or can result therefrom to the same extent and effect as if the same had been specially and formally pleaded herein.

And, further answering in this behalf, said defendant saith that about and concerning all matters of complaint and
136 prayers for relief in said bill of complaint set forth and contained, wherein and whereby said complainant seeks and de-

mands an account of profit, rents, and charges, or to compel said defendant to account for and pay over to said complainant any sum of money, either as alleged purchase-price received by said defendant for the sale of any property to any person named in said Schedule C, or any other person or class of persons, or for rents and profits received, or which ought to have been received, or by reason of any judgment obtained by said complainant, or by reason of any and all demands, claims, or pretenses set forth and contained in said bill of complaint, if all and singular the same are not barred and extinguished in and by the effect of the said final decree in said former action in this court between said complainant and this defendant, the same are in all items and particulars prescribed against by the prescription of three and ten years ordained by the statute of the State of Louisiana in such case made and provided, then
137 and at that time, and still in full force and effect, in that a period of more than ten years had elapsed since the said supposed right of action and demand accrued to said complainant, by her own showing and the filing of her said bill herein, and the service of subpœna therein on the defendant, and the said defendant, in bar of said complainant's demand and claim, and all matter of statement and relief prayed for herein, pleads the prescription of three years and the prescription of ten years in full bar and defense thereto, to the same extent and effect as if the same had been specially and formally pleaded herein.

And, further answering, said defendant saith that said complainant, if she has or ever had any right of action since the year 1834, and has in all things been aware of the fact since the date of the filing of her said former bill of complaint against this defendant in this court, No. 2695, in the year 1856, and unless all of said
138 matters were involved in and determined against her in the issue and final decree in said cause 2695 has in no form instituted an action in any form based on said supposed wrongs in any court until the filing of the present bill herein, but has in all things neglected and failed so to do. That at all times since the year 1856 said complainant has been of full age, over twenty-one years; and that said prescription has in no manner been interrupted or waived by said defendant, but has at all times continued to run uninterrupted, and is in all things complete and effective.

And this defendant denies all and all manner of unlawful combination and confederacy, wherewith it is in said bill charged without this that there is any other matter, cause, or thing in the said complainant's bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or
139 denied is true to the knowledge or belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct; and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

And in witness hereof said defendant doth hereto affix its corporal seal.

[Seal of City of New Orleans.]

(Signed) I. W. PATTON, *Mayor.*

(Signed) J. R. BECKWITH,
Counsel.

E. H. FARRAR,
Assistant City Att'y.

Answer to Amended Bill Referred to in, and Made a Part of, Foregoing Bill of Exception.

Circuit Court of the United States, District of Louisiana. In Equity.

The answer of the City of New Orleans, defendant, to the amended bill of complaint of the complainant, Myra Clark Gaines, No. 8825.

This defendant, saving and reserving to itself all and all manner of exception and causes of demurrer to the said complainant's said amended bill of complaint herein, and for answer thereto, or to so much thereof as it is advised that it is material or necessary to make answer thereto, states: That it is advised and informed that the said complainant hath not, in or by the said amendments, made or stated a different case from the one stated in her said bill as filed, and that, as to all and singular the matters set forth in said supposed amended bill, said defendant, for answer thereto, answer, as in its said answer heretofore made and filed herein, and insists upon the same, with all its averments, objections, pleas, and issues, as a full and complete answer to said bill as amended to the same extent and effect as if the same was, in all particulars and respects, reiterated and repeated, and that, all and singular, all the matters set forth in said bill of complaint as amended, are, in all things, matters which have been long since adjudicated upon, as set forth in its said answer heretofore made and filed herein. And,

141 further answering, said defendant saith that it is not true that there survived in the said plaintiff any other or new cause of action. And, further answering, said defendant again saith that the said complainant is not, and never was, either the legitimate heir or issue of the said Daniel Clark; nor is she his legatee, and that the pretended will under which she claims is a sham and invention, and never existed as a fact; and that, if the same ever did exist, the plaintiff, in all things, abandoned all rights thereunder when she pretended to be legitimate issue and heir-at-law of said deceased, as set out in the answer on file herein.

And, further answering, defendant saith that it is not true that defendant in any manner became a party to, or by employment of counsel became bound by, the proceedings in the suits against the possessors of said lands as set forth in said bill and its amendments so called. And said defendant generally and specially denies each and all of the charges and statements in said amendments,

142 contained not hereinbefore and in said original answer specially denied, and said defendant prays as in its said original answer it hath already prayed.

In witness whereof the mayor of the said defendant, City of New Orleans, hath hereunto set his hand and caused the seal of said corporation to be attached hereto.

[SEAL.] (Signed) I. W. PATTON, *Mayor.*

(Signed) J. R. BECKWITH, *Counsel.*

Replication Referred to in, and Made Part of, Foregoing Bill of Exceptions.

United States Circuit Court, District of Louisiana.

MYRA C. GAINES *vs.* CITY OF NEW ORLEANS.

The replication of Myra Clark Gaines, complainant, against the City of New Orleans, defendant.

This repliant, aver-ing and reserving to herself now and at all times hereafter all and all manner of advantage of exception
143 to the manifold insufficiencies of the answers to the respectively original and amended bills of complaint, for replication thereunto, says: That she will aver, maintain, and prove her said bills to be true, certain, and sufficient in the law to be answered under, and that the said respective answers of said defendant are uncertain, untrue, and insufficient to be replied unto by the repliant, without this, that any other matter or things whatsoever in the said answer contained material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, avoided, traversed, or denied is true, all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by said bills, original and amended, she has already prayed.

(Signed) WM. REED MILLS,
Solicitor for Complainant.

143-½ *Opinion of Judge Edward C. Billings, Pronounced May* 3, 1883.

Circuit Court of the United States, Eastern District of Louisana.

MYRA CLARK GAINES, *vs.* THE CITY OF NEW ORLEANS.

Opinion Referred to in and Made Part of the Foregoing Bill of Exceptions.

143-¾ Circuit Court of the United States, Eastern District of Louisiana.

MYRA CLARK GAINES *vs.* THE CITY OF NEW ORLEANS.

EDWARD C. BILLINGS, *Judge:*

This cause is before me on a submission for a final decree upon bill, answer, replication, exhibits, and depositions and upon exceptions to the report of the master.

There can be no doubt but that this cause is one over which a court of equity must take jurisdiction.

It is an incident, and in its nature a supplemental proceeding, to

a litigation as to the heirship and title of the complainant to certain real property which has been conducted in this court between the parties hereto for upwards of forty years and always upon the equity side of the court. It is a suit for a discovery as to the means which have been employed by the defendant throughout this long period to prevent and hinder the complainant from recovering possession of this real property. See Comyn's Digest, chancery (3 B 1), where it is laid down that a bill for discovery lies even when the action to be supported sounds in tort.

It is a suit for an accounting as to the rents and profits of this real property for the period of forty-five years, which must be taken according to the laws of Louisiana, and in which, there-
143–4 fore, the defendant must be charged with the rents and profits which have been or ought to have been annually received and credited with the yearly expenditures for reclamation, improvements, and taxes, and that, too, with reference to hundreds of lots of ground. It is an account, the correct statement of which by the master occupies 300 pages and upon which the record shows he has been occupied almost three years. It is, therefore, an account of a most complicated and ramified character, which could not be dealt with upon a trial at law at *nisi prius*.

The fact that the Constitution of the United States guarantees to all suitors in common law cases, where more than $20 is involved, a trial by jury should insure precision on the part of courts, in discriminating as to the proper character of causes, but cannot change the answer to the question as to whether a cause is equitable cognizance. That must depend upon whether it be such a cause as the English court of chancery would have taken cognizance of at the time of the adoption of the Constitution of the United States.

The case of Root *vs.* Railroad Company, 105 U. S. R., 189, relied on by defendant, by no means excludes this case from the equity courts. On the contrary, while it holds that where there is no element of trust and where there are no other special circumstances which would authorize jurisdiction in equity an action for an account is an action at law, it adds the express reservation, p. 216, that "an equity may arise out of and inhere in the nature of the account itself, if it render a remedy in a legal tribunal difficult, inadequate, and incomplete."

In Hipp *vs.* Babin, 19 How., 271, there is the same objection made. That was a suit for a naked accounting as to rents and profits. There were no equity features. The court in declining jurisdiction, p. 279, says: "To authorize jurisdiction it must appear that the courts of law could not give a plain, adequate, and complete remedy," and that that case did not show that justice could be administered with less expense and vexation in a court of equity than in a court of law."

In ex parte Bax, 2 Vesey, Sr., 388, Lord Hardwicke said: In an action at law an account is to be taken by auditors. Indeed, where the auditors have taken the account, and on charging and discharging the items, issues may be joined; and so many issues then
143–5 may be tried; actions at law, therefore, for accounts are so few because so long time is required.

In O'Connor *vs.* Spaight, 1 Schoales & Lefroy, p. 309, Lord Redesdale said (this was an action for an account by a landlord against a tenant for rent): "The ground on which I think this is a proper case for equity is that the account has become so complicated that a court of law would be incompetent to examine it upon a trial at *nisi prius* with all necessary accuracy." "This is a principle on which courts of equity constantly act by taking cognizance of matters which, though cognizable by courts of law, are yet so involved with a complex account that it cannot properly be taken at law."

In corporation of Carlisle *vs.* Wilson, 13 Vesey, Jr., p. 278, the Lord Chancellor (Erskine) says: "The principles upon which courts of equity originally entertained suits for an account when a party had a legal title is that, though he might support a suit at law, a court of law either cannot give a remedy, or cannot give so complete a remedy, as a court of equity."

In Weymouth *vs.* Rozier, 1 Vesey, Jr., p. 424, Mr. Justice Buller, sitting for the chancellor (Lord Thurlow), says: "We have the authority of Lord Hardwicke that if a case was doubtful, or the remedy at law difficult, he would not pronounce against the equity jurisdiction. The same principle has been laid down by Lord Bathurst."

In Fowle *vs.* Lawrenson, 5 Peters, 495, the Supreme Court says: "In all cases in which an action of account would be the proper remedy at law, the jurisdiction of a court of equity is undoubted. In transactions not of the peculiar character of those in this case, great complexity ought to exist to give jurisdiction."

In Barber *vs.* Barber, 21 How., 591, the court says: "It is not enough that a court of law also has jurisdiction; the remedy at law must be as practicable and efficacious to the ends of justice and its prompt administration to exclude."

In Mitchell *vs.* Great Works Manufacturing Company, 2 Story, 653, Justice Story, overruling a demurrer to a bill for an account, says: "Considering the complications and changes of interest, the claims cannot be adequately examined except in a court of equity."

143–6 In Nelson *vs.* Harris, 1 Yerger's R., 272, the Court say-:

"It is contended by the defendants that, as the plaintiff's title is a pure legal title, he has a remedy at law for the mesne profits, and that, if his bill had been demurred to, it would have been dismissed. This position is wholly gratuitous, unsupported either upon principle or authority. It has been overlooked by them that courts of equity have concurrent jurisdiction with courts of law in cases of account." See also Judge Whyte's review of the English cases at p. 373.

"'So there shall be an account in equity for mesne profits." Comyns' Digest, Chancery (2 A. 1). "But not till possession has been recovered, as trespass will not lie, at law, for them, till then." Comyns' Digest, Chancery (2 A. 2).

"Equity will decree an account of rents and profits whenever the account is intricate and complicated, and, therefore, not easily adjusted at law. And this holds not only where the matters grow out of a privity of contract, as between landlord and tenant, but in

many cases of adverse and conflicting claims." Holcombe Equity, p. 85.

See also 1 Maddock Chancery, 868; Cooper's Equity Pleading, 134; Ludlow *vs.* Simond, 2 Caines' Cases, 40 per Thompson, Judge; Knott *vs.* Tarver, 8 Ala., 743, and Printup *vs.* Mitchell, 17 Ga., 568.

From an early date equity decreed an account of mesne profits when there were particular circumstances which involve an equity. By the lord keeper in Tilley *vs.* Bridges, Pre., Ch., 252. This exception includes all cases which involve an equity which cannot be made available at law. Fonblanque's Equity, vol. 1, marginal paging 14 and 15, and note. 4th Am. Ed. by Laussat. If the recovery of the demand had been unconsciously obstructed that of itself constituted an equity. Curtis *vs.* Curtis, 2 Brown's Cha. R., 633. Per Sir Lloyd Kenyon, afterwards Chief Justice and Lord Kenyon.

The gravamen of the bill of complaint is that the defendant, by her direct efforts, persisted in *mala fide*, has kept the complainant out of possession for forty-seven years, and until any remedy by an account at law is practically impossible. This allegation alone, according to the principle laid down in Pultman *vs.* Warren, 6 Vesey, 73, would give jurisdiction.

143–7 But there is another distinct ground of equity jurisdiction here. The complainant has recovered judgment against several hundred actual tenants for rents and profits for varying portions of this long period. These tenants are insolvent. The defendant in this action is the warrantor of all those tenants, and whatever they owe the complainant the defendant owes to them. The defendant is not only a warrantor, but she is a warrantor who has enriched herself by purchasing in bad faith the complainant's property and selling it at a profit of $500,000. This sum she has retained and has had the use of since the year 1837. The complainant has no remedy at law upon this warranty from want of privity. Equity, therefore, gives her a right of action. This case is, in principle, the case of Riddle *vs.* Mandeville, 5 Cranch, 322, where "an endorser of a promissory note, who had been adjudged to have no remedy at law against a remote indorser, was held to be entitled to maintain a suit in equity against him, on the ground that the defendant, as the original indorser of the note, was ultimately responsible for it; and that equity would decree the payment to be made immediately, by the person ultimately responsible, to the person actually entitled to receive the money." Page 329.

It is but another application of the principle laid down by Mr. Story in his Equity Jurisprudence, section 687, that where an owner and lessor would have no action at law against an under tenant upon his covenant for rent, still, if the original tenant was insolvent, equity would give the owner a direct action against the under tenant. The reason assigned by Mr. Story is that the under tenant should not be permitted to enjoy the profits of possession without accounting to the original lessor, because, if the original lessee had paid, he would have had a remedy over against the under tenant.

It is but another application of the well-settled principle recognized in the familiar case put by Chief Justice Marshall, *ibidem*, 5

Cranch, p. 330, of a right of action by a creditor of an estate against the legatees of his debtor. "If," says Chief Justice Marshall, "doubts of his right to sue in chancery could be entertained while the executor was solvent, none can exist after he has become insolvent. Yet the creditor would have no legal claim on the legatees,
143–8 and could maintain no action at law against them. The right of the executor, however, may in a court of equity be asserted by the creditor, and as the legatees would be ultimately responsible for his debt, equity will make them immediately responsible."

The principle here to be invoked and which is controlling is that equity will not allow a party ultimately liable, for his own advantage, to keep the owner out of possession and an intermediate and an insolvent party in possession, who is, in turn, responsible to the lawful owner, and thereby to enrich himself out of the property of that owner thus possessed and escape liability to him for want of a mode of action.

This principle is laid down in broader terms by Lord Justice Turner in the case of the Emperor of Austria *vs.* Day & Kossuth, 3 Degex, F. and J. (64 English Chancery), thus: "The highest authority upon the jurisdiction of this court, in enumerating the cases to which the jurisdiction of this court extends, mentions cases of this class where the principles of law by which the ordinary courts are guided give no right, but upon principles of universal justice the judicial power is necessary and the positive law is silent."

The conclusion, therefore, is unavoidable that this suit is properly brought as a suit in equity.

1. Because as a bill for discovery of the participation of the defendant in, and her advantage from, the provoking and maintaining a litigation which, commenced in bad faith, has, upon various pretexts, been made to keep the complainant out of the enjoyment of a large inheritance for 47 years; and—

2. Because, whether the bill of complaint be viewed as an incident to a litigation which has lasted in a court of equity for half a century, calling for an account for rents and profits for that whole period as to a vast number of separate lots and calling for a distinct and detailed statement of account for each lot, under a system of law by which, on the one hand, the annual profits or value for use, and on the other hand the yearly disbursements for ameliorations and taxes, must be ascertained and stated, and where it is made to appear that this exhaustive complexity is altogether due to the hindrances which have been interposed by the defendant, or whether the bill of complaint be viewed as leveled at a defendant who,
143–9 under an obligation to indemnify a possessor in case of eviction and for the purpose of retaining an enormous price unjustly obtained and avoiding a liability for fruits which must be rendered to the real owner upon her recovery of possession, has, directly as well as through that possessor, by all manner of legal artifices, in bad faith, kept that owner out of possession of her own, that possessor having no means wherewith to respond to the owner when evicted and adjudged to deliver up the property with

its fruits, whether the bill of complaint is viewed with reference to either of the distinct grounds which it presents for equitable jurisdiction—*a fortiori*, if it be viewed with reference to all, it states a case over which a court of equity has undoubted cognizance.

As to the cause upon the bill, amended bill, answer, pleas, and proofs:

The averments of the bill which it is necessary to consider are as follows: That the complainant was the legitimate daughter of Daniel Clark, and by his last will and testament (will of 1813), became his universal legatee and inherited the property known as the "Blanc tract," which is set out in the bill by metes and bounds; that in the year 1334 the First Municipality, a corporation whose property and liabilities were by the amended charters transmitted to the present City of New Orleans, fraudulently obtained possession under a pretended title of the said "Blanc tract," and in the year 1837 divided it into squares and lots, and for a price exceeding $400,000 conveyed it to a multiplicity of grantees, who, by mesne conveyances, granted in parcels and subdivisions said tract to tenants who, as well as the original and intermediate grantees, took in bad faith. The bill further avers an eviction and recovery by the complainant against these tenants for the entire tract and for fruits for portions of the time of deseizin, their insolvency; that the defendant is a warrantor of all said tenants, was notified, and, in fact, made the defenses in the suits terminating in the judgments for eviction and for fruits; that a separate suit for a portion of this tract was commenced and maintained against the defendant, in which all of the facts and propositions of law relating to complainant's title and the liability and wrong-doing of the defendant were judicially determined; that, in spite of the requests of
143–10 the tenants, to surrender to the complainant, the defendant compelled them by threats to allow her to continue the defenses; that as a final resort, when the rights of the complainant had been, after thirty-five years of litigation, fully established by the probate of the spoliated will of Daniel Clark, by the supreme court of this State, and by the complete establishment of the rights of the complainant to this property as against the defendant, by decrees between these parties, by the Supreme Court of the United States, the defendant in the year 1867, caused a suit to be instituted for the pretended purpose of revoking the probate of the will of Daniel Clark, and thereby delayed and hindered the complainant's recovery for a further period of ten years; that all this delay and hindrance has been caused by the defendant alone for the purpose of enriching herself by thereby saving herself from her ultimate liability upon her warranty for the return of the price and for fruits and revenues; and upon these averments the complainant demands judgment against the defendant for the rents which were received and which ought to have been received, and which the complainant would have received but for the alleged long-continued and enormous wrong of the defendant.

The defenses contained in the answer of the defendant are in substance a denial of the bill, as well as—

1. Plea of prescription of one, two, and three years.
2. Good faith of the defendant.
3. Reduction of amount alleged by the bill to have been received for the property at public auction.
4. Collusion in the case of Gaines *vs.* Hennen.
5. Denial of insolvency of the tenants.
6. Plea that the judgment in the case of Gaines *vs.* The City of New Orleans is such an adjudication as precludes complainant from bringing this suit, and
7. Irregular and fraudulent character of some of the judgments in the Agnelly and Monsseaux—*i. e.*, the possessory, suits.

I will consider these defenses *seriatim*:

1. Prescription.

This is a suit which, according to all authorities, both under the common law and the law of Louisiana, could not have been brought until the complainant had recovered possession; Gaines
143–11 *vs.* City of New Orleans, 15 Wall., 633. Her judgments in the Agnelly and Monsseaux cases, wherein she recovered judgment for possession and for partial fruits, were rendered May 7, 1877, and, therefore, did not become final until May 3, 1879.

This present suit was filed August 7, 1879. All ground, even for discussion as to prescription, is wanting.

2. Good faith of the defendant.

This issue has been absolutely and finally settled adversely to the city of New Orleans, in Gaines *vs.* The City of New Orleans, 6 Wallace and 15 Wallace.

3. As to the amount of price received from the sale of the Blanc tract at the public auction in 1837.

The report of the master and the adjudication shows the aggregate amount derived from this sale to have been $482,525, besides $86,405, the amount of price of adjudication of certain lots for which no evidence of deeds of sale appears. (Master's Report, p. 24.)

4. As to any alleged collusion between the parties in the case of Gaines *vs.* Hennen, there is not a scintilla of evidence in the record in support of this averment, and it becomes of little moment except as bearing upon the question of good faith of the defendant. This has, as has been observed before, been settled, and is no longer an open question.

5. The matter of the insolvency of the tenants appears by the testimony of Florville Foy and Jules Vienne.

6. Plea that the judgment in the case of Gaines *vs.* The City of New Orleans is such an adjudication as precludes the complainant from bringing this suit. The suit here referred to is known in this record as suit No. 2695. It was an ejectment suit, conducted on the equity side of this court as a suit in part for discovery. It was filed originally with reference to the whole Blanc tract. The defendant's answer contained a disclaimer as to any title or possession of the tract except that square upon which was situated the draining machine, and some other small pieces. The answer disclosed the names of the occupants who were alleged to be in possession of the rest of

the tract. Upon the coming in of defendant's disclaimer
143–12 the complainant took no further proceedings as to the portion of the tract covered by it, and the cause proceeded, and the judgment was with reference to the portion as to which possession was not disclaimed. There was no judgment upon the disclaimer. In fact, no issue was joined upon it. The judgment has precisely the same scope and effect as if the bill, as originally filed, had sought a discovery and recovery of property and fruits as to the square occupied by the drainage machine alone, and the other squares, not included in the disclaimer.

Indeed, after the disclaimer, it became necessary that the possessory actions against the occupants should be commenced and terminated before this present action would lie.

An exception was made, after the cause had come back from the Supreme Court, and was before the court upon the master's report, which presented the question whether the complainant could treat the city as a trustee for the price received by her for the Blanc tract.

The question was solved by the court declaring that, in an ejectment bill against a party holding by an adverse title, there could be no trust raised up as to the price received, in case of sale of a portion—*i. e.*, that the whole aim of the bill was inconsistent with the claim thus urged by the exception. This ruling and decree can, by no construction, be made to be adverse to, or even relate to, the claim presented here. This claim is not only not inconsistent with the ejectment suit, but follows, and could only follow, as a consequence from that suit and the recovery in the possessory suits.

The revenues upon which the master has reported are those derived or derivable from lands not included in the suit No. 2695, after the disclaimer and not embraced in the judgment.

7. That some of the judgments against the tenants (in the Agnelly and Monsseaux suits) were irregular and fraudulent.

The evidence which seems to be relied upon is that, in some of the instances in which judgments *pro confesso* were entered, the subpœnas are not in the records.

This, by no means, overcomes the *prima facie* case made by the judgment itself, as it cannot be presumed the court would have rendered it without proof of services of process.

143–13 I do not find that the special defences are in any respect sustained.

The exceptions to the report of the master are, for the most part, treated and disposed of in the subsequent portions of the opinion.

As to those not there discussed, which have been filed by the defendant:

1. As to the order of reference. I take it it is not to be disputed that the court may order a reference of any part of an equity cause whenever, in its opinion, the ends of justice require it and the matter referred can be considered by the master consistently with the rules of pleading and evidence. This order was made by the court in anticipation of the long time necessary to take and state this intricate and prolonged account, and with the purpose of putting into

force the condition and stipulation upon which the judgment against the defendant, taken *pro confesso*, had been vacated, viz.: to speed a cause which sought to enforce a right to an inheritance, the contest as to which had been prolonged far beyond two average human lives, and, with respect to which, the controlling principles had been settled, never to be shaken. The thing as to which the account was directed to be taken was specifically defined, and the rules upon which it was to be taken were clearly set out in the order of reference.

The only question worthy of any consideration, with reference to such an order, would be whether it was made at a point in the litigation when a reference of the matter committed to the master could be had without prejudice to the rights of the litigants.

The demurrer to the whole bill had been overruled after a very full argument and the court had announced its opinion, to the effect that that portion of the bill, and that alone, was good, by which the complainant sought to recover from the defendant the rents which she might and would have derived from that part of the Blanc tract, from which she had been kept out of possession by the devices of the defendant through her warrantees who occupied. Leave, accordingly, was given to the defendant to still demur to the
143–14 rest of the bill, and a reference was directed to ascertain the rents and profits which the complainant would have derived had she been allowed to remain in undisturbed possession. See Decree, March 27, 1880.

This inquiry was just as capable of being conducted at that point, in the progress of the cause, as after a decree upon the evidence. The complainant, in acting upon the order, incurred the risk of the costs of the reference, in case she should obtain no decree upon the evidence, when the cause should have been finally submitted. The defendant was in no respect prejudiced, and was deprived of nothing but the opportunity for causing still further delay.

2. As to the exception that the master has not reported upon certain questions. Nothing was referred to him except to take and state the account of rents and profits as to the tract of land known as the Blanc tract, both those realized and those which might have been acquired with ordinary good management.

3. As to the exception that, in some respects, the master has not correctly located the tract. The court finds that the location adopted by the master is confirmed by the contemporaneous maps offered as exhibits in this cause.

4. As to the exception that the master has carried on the charges for rent after the judgments of eviction.

This exception is founded on a misapprehension. The master's report shows that he charges the defendant with rents only up to the date of eviction, under the Agnelly and Monsseaux judgments, although he has properly continued the allowance of interest upon the rent dues or amounts of rent till judgment.

The other exceptions to the master's report, on the part of defendant, have been considered in the opinion and are overruled. As to the exception to the master's report, on the part of the complainant,

it is allowed to the extent and for the reasons set fort in the opinion. The additional exception as to the property conveyed to McDonogh, and by him bequeathed to the city of Baltimore, is also founded on a misapprehension. The account is brought down only to 1848, the date of the conveyance from the defendant McDonogh.

The question remains whether the complainant has substantiated her bill, and, by the proofs, made such a case as to entitle
143–15 her to a recovery. The complainant's title, that is, her capacity to take, her heirship, her legitimacy, the will and her right to inherit under it, the entry into possession of this Blanc tract by the defendant; that the defendant in bad faith took her title and sold the property, and received the price, and in all her relations to said property is to be deemed a person dealing in bad faith; that complainant has not renounced her title; and the legal identity of the First Municipality and the City of New Orleans, the defendant, all these facts and issues have been settled beyond question by the Supreme Court of the United States by a solemn judgment between these parties. (See record in suit Myra Clark Gaines *vs.* City of New Orleans, N. 2695, and the case as reported, 6 Wallace, 716, and 15 Wall., 624.)

Under the civil law and the textual provisions of our code the seller even in good faith, in case of eviction, is bound—

1. For a restitution of the price.

2. For a restitution of all fruits and revenues, which the vendee is obliged to restore to the owner.

3. For the costs, and

4. For all damages which the vendor has suffered, besides the price paid. (Civil Code, Arts, 2506, 2507, 2510; Morris *vs.* Abat, 9 L., 352, and Downs *vs.* Scott, 3 Ann, 278.)

The possessor in bad faith is bound to surrender the thing immediately, and the seller and warrantor, who took and conveyed in bad faith, is bound forthwith to restore the price to his vendee and to acquit, *i. e.*, discharge for him, his liability to the owner, without suit or condemnation.

He is in law a usurper and liable for his successors. (Pothier, Contracts of Sale, No. 127.)

The complainant's title being incontrovertibly established as well as the *mala fides* of the defendant, the simple inquiry is in what manner and to what extent did the defendant delay or hinder restitution, for any delay, much more, any hindrance, was a fault.

The testimony shows that in 1836 this complainant first commenced her judicial demands against the First Municipality, in whose place the defendant stands, for this property; that six times
143–16 she has been compelled to go before the Supreme Court of the United States, upon an appeal or writ of error, in the prosecution of her efforts to obtain restitution, mediately or immediately, from the defendant; that, prior to the year 1855, that tribunal could give no relief, though intimating that they were impressed with the equity of her cause, because she claimed property situated in the State of Louisiana, under a will not probated in that State, and from a testator whose will was declared by the probate

courts of that State to be a different instrument, and one which excluded the complainant; that thereupon, in 1855, complainant succeeded in obtaining the recognition of the genuine last will and testament of her father from the proper tribunal of this State, and, in 1860, her right to inherit and recover under that will was authoritatively admitted and decreed by the Supreme Court of the United States, in the case of Gaines vs. Hennen, 24 How., 615; that, in that case, not only was every point established, which was material or requisite, to entitle the complainant to vindicate her title to this entire tract of land and to recover against this defendant, but the court emphasized its decision by the expression of the hope that opposition to rights so clear and, even then, so unduly resisted, would thereafter cease; that this defendant, nevertheless, continued her opposition by a defense to the suit of the complainant against the defendant in which cause, in 1866, the propositions of law and the conclusions as to the facts upon which the case of Hennen had been decided were reiterated by the United States Supreme Court with this severe rebuke to the defendant: "It was supposed after the decision in Gaines *vs.* Hennen that the litigation, which had been conducted in one form or another for over thirty years by the complainant to vindicate her rights in the estate of her father, was ended; but this reasonable expectation has not been realized, for other causes, involving the same issues and pleadings and upon the same evidence, are now pending before this court," see Gaines *vs.* City of New Orleans, 16 Wall., 716; that the defendant, in the year 1867, joined in the institution and prosecution of a suit known as the Fuentes suit, in which it was attempted to revoke the decree by which the will of 1813, upon which the complainant's rights rested, had been probated; that upon the suggestion 143–17 by the defendant of the pendency of this Fuentes suit, the circuit court of the United States for this district ordered a stay of proceedings in the causes known as the "Agnelly and Monsseaux cases," which had been brought in that court by the complainant against several hundred of actual tenants of this Blanc tract, who were intermediate warrantees of the defendant, to recover possession and fruits; that these possessory suits were thus made to pause till the final decree in the Fuentes case, whereby in May, 1877, the prayer to revoke the probate of the will of 1813 was rejected; that the Fuentes suit, of itself, hindered the complainant in obtaining restitution eight or ten years; that, shortly after the decision of the Supreme Court of the United States, in Gaines *vs.* The City of New Orleans, numerous parties, tenants upon this Blanc tract, under titles emanating from the defendant, united in a petition addressed to her, in substance, asking that the defendant should acquiesce in the demand of the complainant as the rightful owner, make restitution and end a useless and already decided contest; but that the defendant refused to comply with this petition, and, through her counsel and attorney, entered upon and virtually conducted the defense against the demand of the complainant for possession and for the fruits of this tract, pending in the Agnelly and Monsseaux cases; that complainant, in May, 1877, recov-

ered judgments for possession and for partial rents, for portions of the time of her dispossession, which judgments, there being no appeal, became final in May, 1879; that the insolvency of the tenants in the Agnelly and Monsseaux case is established, and that the former holders of titles derived from the defendant, former occupiers of this tract, are either insolvent or dead, without representation, or cannot be found; that in August, 1879, this suit was commenced; that the answer of the defendant herein, among other defenses, denies all title on the part of the complainant to the Blanc tract, denies that the will of Daniel Clark, of 1813, is valid or operative, and the capacity of the complainant to take under it, and her heirship, avers the complete good faith of the defendant; in short, with a temerity amounting to hardihood, presents and urges, as if new and undecided, all the issues which had been for so many years con-
143–18 troverted between the complainant and defendant, and which were decided adversely to the defendant by the Supreme Court of the United States in 1860, emphatically reaffirmed adversely to the defendant in her own case in 1867, and decided and practically enforced against the numerous defendants by final judgments in the Agnelly and Monsseaux cases, who were all warrantees of the defendant, who had notice and defended, which, by operation of law, rendered these last decrees also judgments against the defendant herself.

This recital, which is but a summarization of the proceedings and adjudications disclosed by the records in the various causes which constitute the litigation between these parties—this unabating and defiant resistence to rights decreed from the beginning to have been known, and thus solemnly and frequently declared, abundantly establishes that from the year 1837 to the year 1879, the defendant, with her large resources and power, by unconscionable proceedings, has kept the complainant from the possession of this property, with no conceivable object, save the exhaustion of complainant and the consequent retention as against the defendant's vendees of the $500,000 which the defendant had in the year 1837 received for this property, and the evasion of her just liability for fruits.

That this is a fault of an aggravated character, the perpetration of which has been persisted in beyond all precedent, cannot be doubted. Civil Code, Art. 2315 and 2324. Irish *vs.* Wright, 8 Rob., 428, 432, Smith *vs.* Berwick, 12 Rob., 20, 25.

That this wrong has been committed under the guise of judicial proceedings cannot exempt from liability.

He who, with a motive to deprive another of that which he knows is justly that other's, employs the process and machinery of the courts, is under obligation to satisfy all damages which that other thereby suffers. The damages springing from the legitimate exercise of legal rights, even when there is an absence of malice, and there is good faith, must at least consist in placing the injured party in the situation in which he would have been if the disturbance had not taken place. Gray *vs.* Lowe, 11 Ann., 392 and 393; Sellick *vs.* Kelly, 11 Rob., 150; Horn *vs.* Bayode, 11 Rob., 263, 264; Morse *vs.* Wittenberg, 13 Ann., 22.

The case of Dyke *vs.* Walker, 5 Ann., 519, illustrates the extent to which damages are allowed for injury effected by litiga-
143–19 tion, for there plaintiffs were allowed compensation for being compelled to go to protest and for loss of credit. When a party makes use of judicial procedure in bad faith, he is subjected to a peculiar and severer rule in the assessment of damages.

The liability of a corporation, municipal or other, for the wrongful and injurious acts of its officers and agents when acting within the scope of their authority, or when the corporation has ratified their acts, is, under the law of Louisiana, settled.

McGray *vs.* City of Lafayette, 6 Rob., 668; same case, 4 Ann., 440; Rakesse *vs.* Navigation Co., 5 L., 463, 464; Wilde *vs.* City of New Orleans, 12 Ann., 15; and Gaines *vs.* City of New Orleans, 6 Wall., 716.

Nor does it diminish the liability of the defendant that she has, in some instances, conducted and urged these defenses in the capacity of warrantor. The warrantor is, by the settled jurisprudence of this State, the real defendant. Millaudon *vs.* McDonogh, 18 La., 108, and cases there cited. The defendant had the right, which the evidence shows she exercised, with a guilty knowledge, to assume the conduct of the Fuentes case and the defense of the Agnelly and Monsseaux cases, as well as with the same knowledge to procrastinate the accession of the complainant to her estate by the defense of causes where she was the sole party defendant, but by so doing she incurred the liability which rests upon all parties who employ legal process and effect legal hindrance in bad faith and against what are ultimately declared to be rights of others and to their damage; she must make full reparation.

The case of Chirac *vs.* Reinicker, 11 Wheaton, 279, is in point, and illustrates the ground of the defendant's liability. In that case, in an ejectment suit, there had been a recovery of possession against a tenant, and a party, other than the defendant in the reported case, had, with the consent of the plaintiff, been admitted to defend as landlord. The court held that, notwithstanding this, if the defendant had derived profit and had aided in resisting the title of the plaintiff and his recovery of possession by employing counsel and defending the suit, he also was liable for mesne profits.

"An actual occupation of the premises by the defendants dur-
ing the period for which damages are claimed is unnec-
143–20 essary; it is sufficient if he was interested in and derived profits from the premises during that period." Adams on Ejectment, marginal paging, 383.

The question as to the amount of damages is two-fold, resulting from the double character in which the defendant is liable.

If we view the complainant as simply substituted in equity to the rights which the vendees, warrantees, would have had the amount to be recovered would be determined by what had been recovered in the Agnelly and Monsseaux cases.

The evidence shows the defendant was called in warranty in some

of those cases, and was notified in all; that she took upon herself the defense and, through her attorney, conducted it. The judgment is binding upon the warrantor if he has been called in warranty, or he is apprised of suit having been brought. Civil Code, arts. 2517, 2518, 2519; Code of Practice, arts. 388, 714. The cases of Vienne *vs.* Harris, 14 An., 382, and Late *vs.* Armorer, 14 Ann., 826, establish that judgment against the vendee is, *prima facie*, sufficient to authorize judgment against vendor and warrantor, and that when the latter has had notice, though he did not appear, the judgment is conclusive against him. See also Johnson *vs.* Wild, 8 Ann., 129, and Williams *vs.* LeBlanc, 14 Ann., 757.

The record of the Agnelly and Monsseaux cases were not only properly introduced as evidence in this case, even without the verification afresh by the witnesses of their testimony, which was also had, but the defendant having had notice, and having appeared, is concluded by the judgments therein rendered both as to the eviction and as to the fruits.

As to the rule to be followed in ascertaining the rents and profits the court, in the order of reference, directed the master to take account not only of the rents, revenues, and values for use actually received, but also of those which the evidence showed would have been received with ordinary good management. In the Agnelly and Monsseaux causes, in response to a request of the masters for instructions upon this point, the court ruled as follows:

"The defendants, therefore, must, in accordance with the very textual provisions of the law, restore all products of the
143–21 property which they have possessed. They are also liable for the products which they ought to have realized with ordinary good management. The possessor in bad faith is not held to the highest possible degree of skill and care, but he must have administered as a prudent master of a family. Winter *vs.* Zacharie, 6 Robinson, 467. This was a cause in which the defendant had wrongfully possessed a plantation, and he was adjudged not only liable for the fruits which he received, but those which he could have received with ordinary husbandry; and the doctrine is laid down in express terms, that the possessor in bad faith must not only restore the fruits received, but also those fruits, which with ordinary good management, he ought to have received. That case was determined in the first instance after a thorough argument, and an elaborate opinion was written. Upon a rehearing the court reiterated their view, and it is the settled law of Louisiana down to the present time.

"This question has been raised in the reports of both matters, whether the principles already enunciated apply to all lands, improved and unimproved. They apply to all lands unimproved as well as improved. The complainant is not entitled to a recovery for the revenues which might, by the remotest possibility, have been received by the possessor; on the other hand, she is entitled to all income, revenues, profits, and value for use or occupation which the evidence establishes she, as owner, would have received or derived,

whether the possessor has realized them or not, and whether the failure on his part to realize them resulted from his not managing the estate with ordinary prudence, or from the estate remaining unproductive by reason of the title thereto being in dispute on account of a claim of title on the part of the possessor, now adjudged to have been unfounded."

This is the doctrine distinctly laid down by Mr. Justice Bradley in Gaines *vs.* Lizardi, and Gaines *vs.* New Orleans; 1 Wood's R., p. 105. This is the settled rule of the civil law—The Partidas, Moreau & Carlton's edition, vol. 2, p. 1109, title 14, law 4: "If the possessor held in bad faith and was evicted, he would have been obliged to deliver up the estate, together with all the fruits he had gathered from it, those which he had consumed, and even the rents and
143–22 fruits which he might have gathered from the estate had he cultivated it, inasmuch as he had no right to possess it, and has acted in bad faith."

Precisely this principle was laid down by the circuit court of the United States for the district of Arkansas in Beebe *vs.* Russell, 19 How., 285, which was an action for fraudulently withholding real estate, and for rents and profits. According to the statement of the Supreme Court, in their opinion, wherein they assign their reasons for dismissing the appeal as premature, the circuit court ordered "that the Master take an account of rents and profits received, or which could and ought to have been received."

See this principle expounded in Duranton, vol. 16, p. 307. No. 288; Demolombe, vol. 9, p. 96, and MacEldey's Compendium, No. 154. Says Papinian, L. 62, sec. 1, 6 ff. *de rei vindi:* "Generally, when the amount of fruits is being inquired into we must not consider whether or not the possessor in bad faith has reaped fruits, but whether the complainant (owner) might have reaped fruits if he had been allowed to remain in possession. And this decision is also approved by Julian." (Generaliter autem, quum de fructibus æstimandus quæritur, constat adverti debere, non amulæ fidei possessor fruitus sit, sed an petitor frui potuerit, si ei possidere licuisset—quan sententian Juliaun quoque probat.) See also same author, L. 64, ff. *de rei vind.*

And Paulus, L. 33, *eodem titulo*, says: "Not only the fruits that have been gathered, but also those that might have been gathered must be accounted for." (Fructus non modo percepti, sed et qui percepi honeste potuerunt, æstimandi sunt.)

1 Du Caurroy, pp. 285, 289, 298, Instit. de Justinien (Ed. 1826), says, at page 298: "That the possessor in bad faith must account for all the fruits received, and even for the fruits which, though not received by him, could have been obtained by the owner." (Papin, fr. 62, sec. 1, Paul, fr. 33, cod. v. sec. de off. Ind.; 1 Moreau de Montalin, p. 596 (Ed. 1824), and Analyse des Pandretes de Pothier.)

The common law, as stated in Bracton's "Laws and Customs of England," gives the same rule: "The jurors will diligently inquire what profits the disseizor had received in fruits, rents, and other commodities. They were also to estimate the advan-
143–23 tages the disseizee might have derived from the estate if he had not been disseized." Stearns on Real Actions, 393.

The amounts already in judgments would establish the limit of recovery if there was nothing but the naked liability flowing from the law of warranty; but there is here another ground of liability on the part of the defendant which is to be considered in connection with, but which exists independent of the warranty. The warranty gave the defendant her moneyed interest in defeating and delaying the complainant in the enforcement of her rights; but it is the unjust hindrance which was the cause and is the measure of the damage, for it cannot be that a wrongdoer can so frame the execution of his wrong as to limit his liability short of complete indemnity. The evidence shows that for 47 years the City of New Orleans has in bad faith kept the complainant out of the possession of her property; that she has done this by using her vast resources and even her power of annually taxing complainant's property for keeping in prosecution a gigantic system of litigation, having for its object to prevent the complainant from possessing and enjoying property which the defendant knew, and had been judicially decreed to have known, belonged to complainant.

It is not now as warrantor that we are considering the defendant's conduct, but as a person who, from motives springing from her own advantage, has caused to the complainant pecuniary loss, and that, too, when aware of her own wrong-doing. From this fact a liability springs up which is not necessarily satisfied by the redress given indirectly through the machinery of warranty—*i. e.*, the complainant may recover from the defendant all the loss which she suffered for the entire period during which she has been kept out of possession by the defendant.

Of all the writers on the subject of the obligation to redress wrongs and injuries none are more discriminating or consider the matter in broader relations than Puffendorf in his Law of Nations. He states, book III, chapter 1, section 3, the division of damage by the civilians into *damnum emergens* (loss which one suffers by diminishing his present goods) and *lucrum cessans* (damage which one receives by loss of gain which he might have made).

143–24 "All hurt, spoil, or diminution of whatever is actually our own, and all interception of what we ought to receive," the same writer says, entitles us to reparation. At section 4 he enumerates those who are responsible for a wrong as comprising those who give any real assistance in the act of damage, or who, by any antecedent motion or default, caused it to be undertaken, or who came in for any part of the advantage; to those, he says, must be added all who hinder the duty of restitution. He cites the case of Probus, a prefect who, under the Emperor Valentinian, did nothing but protect his clients in unlawful action, and he was held to be responsible therefor; "for here," says the author, "protection of a great patron interposing hindered them from making good the damage they had been guilty of."

At the common law, at a time when its maxims were but an utterance of the civil law in another tongue, the disseizor was liable for the possession of his grantees and feoffees, and until the statutes of Gloucester and Marlbridge he alone was liable, and after those stat-

utes the tenants were liable to the extent of the insolvency of the disseizor. In construing the statute it was held that the damages should still be recovered against the disseisor if he was able to satisfy them. See a summary of the law on this point derived from Bracton in Professor Stearns' Treatise on Real Actions, pp. 389 and 390.

See Pothier, contract of sale, Cushing's translation, No. 127.

Now in this case the evidence establishes that the tenants have been kept from making restitution and the complainant from receiving it solely by the defendant, and it is a case where every day of hindrance added fresh loss to complainant.

It must be that a defendant clothed with such semi-sovereign powers, alike for repairing or committing injury, must render to this complainant, who, after forty-seven years of resistance, calls it into a court of equity and shows that it is the author of this deliberately unjust and long-continued dispossession, a compensation equal to her established pecuniary loss.

In the light of these twofold liabilities of the defendant I will consider the master's report as to the revenues which were and could have been derived.

143–25 His report enables the court to come to a conclusion on the subject from two distinct processes, sustained by two distinct sources of testimony.

As to the improved property, from an examination of sixty-four different squares and lots, upon the testimony derived largely from the tenants themselves, he shows, after allowing for all expenditures for ameliorations and taxes, and interest upon the same, a net income, averaging 13 per cent. upon 70 per cent. of the price of adjudication at the public auction at which the defendant sold the same in 1837. This, of course, would be a net annual income of over 9 per cent. upon the entire price.

As to the unimproved property, he finds as a fact that it was capable of yielding a revenue, from that which so many lots upon the same tract did yield, and states it as at least five per cent. upon seventy per cent. of the adjudicated price at said public sale.

The evidence fully establishes a further fact that the sole reason which prevented the improvement of the unimproved lots was a fear on the part of pretended owners and of the public that the title of the complainant was well founded.

Now, if the improved yielded an annual income of upwards of nine per cent, net, taking the value as the full price of adjudication, and the unimproved would have been improved but for the doubt which the defendant's wrong inspired as to the title, it follows that 5 per cent. net, at the very lowest, would have been realized, not upon 70 per cent. but upon 100 per cent. of the price of public adjudication

The second source of evidence upon this point is the sale upon ground rents of property within the city limits and its suburbs. In forty-nine instances of ground rent reserved by the city, and forty-six other cases of ground rent reserved by Daniel Clark, in most cases, for the period of twenty-nine years, some of which still con-

tinue, the yearly rent was six per cent. upon the fixed value. The rate at which these ground rents were contemporaneously established and continued, by which the income was fixed far long periods, furnishes a sound, independent standard, and corroborates the inference drawn from the 64 cases into which inquiry was made by
143–26 the master, that the fructual value was considerably above five per cent. upon the ascertained value of the land.

The case shows a great fact which fortifies the conclusion drawn from these facts found by the master.

What the value of this Blanc tract should be held to be, when it is regarded as a capital from which an income is to be held to have been derivable, is additionally and independently established by the auction sale of 1837. The adjudication and other evidence show that at the public sale at which the defendant sold these lots there were upwards of sixty purchasers who had the money to pay the adjudicated price. The city had laid out the Blanc tract, with adjoining property, into squares and lots, and sixty different persons estimated the value of and purchased the same at auction.

The concurrence of so many minds as to the value of these lots, thus expressed and recorded, furnishes a criterion as to its productive value, founded upon so many practical judgments that a court, after a lapse of forty-six years, should not lightly disregard it; certainly not upon the evidence in the record; for the case shows that the complainant commenced her assertion to title to this property by suit against the First Municipality in 1836, and from most of the witnesses, even from those who were defendants themselves, come such statements as to authorize the inference that the value fixed by the public sale of 1837 was prevented from continuing to be the productive value by the doubts which the defendant's unjust pretensions threw upon the title. From this fact alone, then, it might safely be considered as established, and the defendant is estopped from denying that the use of each lot or parcel of this land was yearly worth five per cent. upon this auction price.

The rate of six per cent was virtually allowed for the use of such property by the supreme court of this State in the year 1843. See Erwin *vs.* Green, 7 Robinson, 175. Vacant lots to the value of several hundred thousand dollars had been sold subject to a mortgage which the vendor agreed to remove. Notes for the price were given, dated at the time of the sale, which was contemporaneous with the period of the public sale here in 1837, bearing six per cent. interest, which were deposited to be delivered when the mortgage should be canceled.

The mortgage was not canceled till 1843. The question was
143–27 whether the vender should recover six per cent. interest for the time previous to the cancellation of the mortgage. The court answer, "yes," for two reasons, one of which was that the purchaser could have had possession, and that, by the civil code of Louisiana, he must pay interest if the property did, in the eye of the law, yield a revenue. The case showed that it was vacant city lots, from which the court inferred it was susceptible of yielding a revenue, "for," says the court, "they could have been rented."

The court ought not to overlook a principle always recognized by

the civil authorities, and which is laid down in Pontchartrain Railroad Company *vs.* Carrollton Railroad, 11 Ann., 258 and 259, that even if the evidence as to the value of the rents had been much less satisfactory than it is, and if an accurate estimate of loss had not been attainable upon such clear and full proofs as are here afforded, the defendant having invaded the rights of complainant, and failing itself to furnish more satisfactory proof, would have had to be content with the conclusions to which the court would have been able to arrive from the evidence which had been produced. See also McGrey *vs.* City of Lafayette, *supra*, where the court, in the assessment of compensation, lay great weight upon vexatious and incidental wrongs which have been established.

In short, the burden which bad faith places on the defendant, according to the civil law and the jurisprudence of Louisiana, while it should lead to the assessment of no damages or compensation beyond those actually suffered, requires the court to adopt conclusions fully warranted by evidence, though through the fault of the defendant it must be derived from facts outside of the receipt of actual rents. For, since the law requires the court, in such a case, to go further and decide from evidence extrinsic to actual receipts, it must be admitted that a safe guide may be obtained and in this case has been furnished from the rents and profits, for the very period in question, shown to have been actually derived from so many other lots, adjacent, similarly situated and no better capacitated, from numerous ground rents, and from the opinions of such a multitude of purchasers.

This is a peculiar case. It calls a defendant to a reckoning for fifty years of flagrant and already adjudged wrong. The
143–28 complainant has already recovered possession. The restitution to which the complainant was, and is entitled, is founded upon decrees between the parties which establish it conclusively. The hindrance on the part of the defendant and the amount of compensation due are fully proven. The bad faith of the defendant has been previously determined and is a thing adjudged. The court must not be deterred, by the magnitude of the amount involved, from the application of settled principle of law, and the deduction of conclusions which follow from established facts. The conclusion which must be deduced, after giving all the evidence in this cause its full weight, is that the productive value of the Blanc tract was, in the year 1837, fixed at the public sale, and has not been maintained, but has receded, and has been kept from advancing only by the insecurity as to the title created by the pretensions of the defendant, asserted in bad faith at the outset, and continuously, and persisted in years and years after they had been rejected and even rebuked by the highest tribunal under our Government; and that the actual yearly value, which could and would have been derived from the lots constituting the same by the complainant, had she been allowed to occupy them without unjust molestation from the defendant, is established to have been at least five per cent. upon the price which they brought when sold by the defendant at public auction in 1837.

The master's account is stated in the precise manner determined to be correct in the case of Gaines *vs.* The City of New Orleans, 15 Wallace, 634; *i. e.*, he has stated the account with reference to each lot separately, and has ascertained the rent or income which should have been derived each year and has computed interest at five per cent. upon the same down to January 10, 1881, which point of time he selected for convenience. The master's account shows that the total amount of judgments rendered against the warrantees of the defendant in the Agnelly and Monsseaux suits is $576,707.72. This amount, though less than the evidence shows is requisite to indemnify the complainant, cannot be disturbed. It is to the extent of the periods covered thereby, binding alike upon the complainant and the defendant. A study of his report and the records of the causes introduced in evidence shows that, when the complainant recovered the land, she recovered rents for only a portion of the period of her dis-
143–29 possession, often a small one, as the tenants had been in occupation, only varying fractions of time, since 1837. The proof shows that the earlier intermediate grantees who occupied it are either insolvent, dead without representatives, or, after search, cannot be found. The balance of the amount, viz., $1,045,363.78, which is the aggregate of the rents and profits, which would, with ordinary good management, have been received from the unimproved lots, *i. e.*, for those periods not covered by the possessory judgments, is derived from a detailed statement of the rents from each lot, the yearly rental being 5 per cent. upon 70 per cent. of the price of adjudication in 1837. This rate, according to the conclusion of the court, as stated above, is short of what the evidence shows is the true measure of the rent by 30 per cent.; *i. e.*, that the yearly rent, as established by the evidence, is 5 per cent. upon 100 per cent. of the full price of adjudication and sale. The correction required is made by adding 30 per cent. of this sum where, as has been said, the computation has been made upon a basis of 70 per cent. The amount to be recovered, therefore, would be as follows:

For improved and unimproved land already in judgments	$576,707 92
For balance of rents, unimproved land	1,348,959 91
Total	$1,925,667 83

For which last amount and the costs which have been taxed in the Agnelly and Monnsseaux suits, with interest upon that portion which arises from the yearly sums for rent, from January 10, 1881, the complainant must have a decree.

144 *Decree Referred to in and made Part of Foregoing Bill of Exceptions. Entered and Filed May 5th*, 1883.

U. S. Circuit Court, Eastern District of Louisiana.

MYRA CLARK GAINES *vs.* CITY OF NEW ORLEANS. } No. 8825.

This cause having been submitted on the bill of complaint, the amended bill, the answers, replications, exhibits, and depositions, and the court having duly considered the same, and the report of the master having been submitted upon exceptions thereto by complainant and defendant, and the court having duly considered the same, for the reasons assigned in the written opinion heretofore filed in the cause, the court declares, adjudges, and decrees that the defences set up by the defendant are not sustained, and that the complainant has established the cause set forth in her bill of complaint against the defendant and is entitled to a decree; and it is ordered, adjudged, and decreed that the exceptions to the said report filed by the defendant herein be, and the same are hereby, disallowed
145 and overruled; that the exceptions filed by the complainant herein be allowed so far as relates to the amount in said report stated as due the complainant, except the amount represented by the Agnelly and Monsseaux judgments hereinafter described, and that the complainant, Myra Clark Gaines, do have and recover judgment against the defendant, The City of New Orleans, in the sum of one million nine hundred and twenty-five thousand six hundred and sixty-seven and $\frac{83}{100}$ dollars ($1,925,667.83), with interest at and after the rate of five (5) per centum per annum upon the sum of nine hundred and fifty thousand one hundred and ten dollars ($950,110) from the 10th day of January, A. D. 1881, until paid, and in the further sum of thirty-four thousand dollars ($34,000.00), the amount of costs heretofore taxed against the several defendants in suits of Myra C. Gaines *vs.* P. H. Monsseaux *et als.*, numbered 3663, and Myra C. Gaines *vs.* P. F. Agnelly *et als.*, numbered 6085 of the docket of this court, the names of said defendants be-
146 ing set forth in Schedules or Exhibits "C¹ and C²," annexed to the complainant's bill of complaint in this cause, with interest at the rate of five (5) per centum per annum till paid from January 10th, A. D. 1881, with costs of this suit, and that said Myra Clark Gaines have execution against the said defendant, The City of New Orleans, for said sum of money, with interest as aforesaid and costs.

(Signed) EDWARD C. BILLINGS, *Judge.*

Writ of Fieri Facias Referred to in and made Part of the Foregoing Bill of Exceptions.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Circuit, holding sessions in and for the Eastern District of Louisiana.

The President of the United States to the marshal of the eastern district of Louisiana, or his lawful deputy, Greeting:

You are hereby commanded that you demand, according to law, of the City of New Orleans the sum of one million nine hundred and twenty-five thousand six hundred and sixty-seven $\frac{83}{100}$
147 dollars, with interest on $950,110 at the rate of 5% per annum from the 10th January, 1881, until paid, and the further sum of thirty-four thousand dollars, with interest thereon at the rate of 5% per annum from the 10th January, 1881, until paid, and the costs of suit, viz: Clerk's costs, $66.60; attorneys' fees, docket, $20; attorneys' fees, depositions, $—, and your costs and charges, and also the fees of the master and examiners herein, cash, which Myra Clark Gaines lately recovered by a decree of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, and if the same be not paid on demand, that then you cause the same to be made out of the personal estate of the said City of New Orleans in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the said City of New Orleans in your district, and that you
148 have those moneys before our said court, to render to the said Myra Clark Gaines for the judgment aforesaid, on the 70th day from the date hereof, together with this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 22d day of May, A. D. 1883, and 107th year of the Independence of the United States.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

Marshal's Return.

Received May 23d, 1883, by the U. S. marshal and proceeded to make demand of the City of New Orleans through Hon. W. J. Behan, mayor of the City of New Orleans, for the satisfaction of this writ, when the said mayor, W. J. Behan, answered me that the City of New Orleans had neither money or property to satisfy this writ in whole or in part. I also did, on the 29th day of the same month and year, made a seizure by garnishment process in the hands of the Louisiana National Bank, in the hands of the New Orleans National Bank, in the hands of W. J. Behan, mayor, and in the hands
149 of B. T. Walsh, treasurer of the City of New Orleans, the whole, as will more fully appear by reference to the annexed notice of seizure, marked A, which, together with the return thereon written, is made a part of this return. From said seizures nothing has as yet came into the marshal's hands. No other property found

after due demand made of the attorney of plaintiff. This writ expiring before a final disposition of the seizure by garnishee process above referred to had been made and an appeal herein having been taken by garnishees to which reference is made, I make return and request the clerk of this hon. court to furnish me with a copy of this writ and return thereon in conformity to law.

Returned July 31, 1883.

(Signed) ED. S. WURZBURGER,
Deputy Marshal.

Garnishment Proceedings and Answer of Garnishees Referred to in and made Part of Foregoing Bill of Exceptions. Supplemental Petition and Interrogatories to Garnishees.

150 MYRA CLARK GAINES *versus* CITY OF NEW ORLEANS. } No. 8825.

To the honorable the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

The supplemental petition of Myra Clark Gaines respectfully showeth, that upon the judgment obtained in the case for the sum of one million nine hundred and twenty-five thousand six hundred and sixty-seven $\frac{83}{100}$ dollars costs, petitioner has issued a *fi. fa.;* and having reason to believe that the Louisiana National Bank, The New Orleans National Bank, B. T. Walshe, city treasurer, and individually, and W. J. Behan, mayor of the city of *the city of* New Orleans, and individually, third persons are indebted unto the said defendant in execution, or have property or effects in possession or under control belonging to the said debtor, or are indebted to said petitioner, has caused the seizure to be made in the hands of said third persons.

Therefore petitioner prays that said Louisiana National Bank, The New Orleans National Bank, B. T. Walshe, city treasurer,
151 and individually, and W. J. Behan, and individually, be cited and ordered to answer, under oath, the annexed interrogatories, and after due proceedings condemned to pay the amount of said judgment and costs.

(Signed) WM. REED MILLS.
A. GOLDTHWAITE &
J. WARD GURLEY, JR.,
Sol. for Complainant.

Interrogatories.

1st. interrogatory. Had you in your hands or under your control, directly or indirectly, at the time of the service of notice of seizure in this case, or since, or at the time of service of these interrogatories, or at any time since, or at the time of answering these interrogatories, any money, rights, credits, or other property whatsoever, directly or indirectly, belonging or due to the said defendant in execution, or in which she has or had any direct or indirect interest for the whole or for a part or otherwise; and, if yea, what is the nature,

description, and amount thereof; and is the same not sufficient to pay or satisfy the full amount of said judgment and costs, or,
152 if less, to what amount, you being asked and requested to make a full disclosure in relation to the same.

2d interrogatory. Were you not at the time of service of notice of seizure upon you in this case, or since then, or at the time of service of these interrogatories, or since, or at the time of answering the same, directly or indirectly indebted or obligated unto the said defendant in execution for anything, or for any sum whatever, whether for yourself alone or together with others, in consequence of any sale, or exchange, or transfer, or assignment, or payment, or novation, or compensation, or letting, or hiring, or service, or labor, or employment, or affreightment, or insurance, or job, or work, or rent, or interest, or partnership, or loan, or deposit, or trust, or bailment, or agency, or suretyship, or compromise, or pledge, or in consequence of any contract or obligation whatever, whether the same be due or to become due, and whether the interest of said defendant in execution be direct or indirect, or be for the whole or a part only, or whether it be by bill, note, or otherwise; and, if yea, what is the nature, description, and amount thereof, and is the
153 same not sufficient to pay or satisfy the full amount of said judgment and cost; or, if less, what amount, you being asked and required to make a full and detailed disclosure in relation to the same?

3d interrogatory. Have you at any time since the service of notice of seizure in your hands herein made, directly or indirectly, unto or with the said defendant in execution, any payment, or novation, or compromise, or arrangement, or given her any note or other written obligation, or received from her, directly or indirectly, any receipts or acquittance, or received or acquired against her, directly or indirectly, any compensation or set-off, or demand, or note, or other obligation, or right of action? And, if yea, state the nature, description, and amount thereof, and the time, place, and circumstances of the same.

4. Have you in your possession or under your control particularly the forty thousand dollars received from the Louisville and Nashville R. R. Co. in 1882, in compromise of suit pending between the City of N. O. & the L. & N. R. R. Co.

154 & 155 *Order.*

Let the within supplemental petition be filed, and let the Louisiana National Bank, the New Orleans National Bank, B. T. Walshe, as city treasurer and individually, and W. J. Behan, as mayor and individually, be made garnishees herein and cited to answer the accompanying interrogatories under oath, in writing, and as the law directs, as herein prayed for.

New Orleans, May 29th, 1883.

(Signed) EDWARD C. BILLINGS, *Judge.*

156 UNITED STATES OF AMERICA,
Eastern District of Louisiana:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 8825.

To The Louisiana National Bank, garnishee:

You are hereby cited to declare, on oath what property or effects belonging to the defendant in this case you have in your possession or under your control, or in what sum you are indebted to said defendant; and also to answer in writing, under oath, the interrogatories annexed to the petition, of which a copy accompanies this citation, and deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, within ten days after the service hereof; otherwise judgment will be entered against you for the amount claimed by the plaintiff, with interest and costs.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 29th day of May, A. D. one thousand eight hundred and eighty-three, and of the Independence of the United States of America, the 107th year.

Teste:

[SEAL] (Signed) F. A. WOOLFLEY, *Clerk.*

157 *Marshal's Return.*

Received May 29th, 1883, by the U. S. marshal, and on May 29th, 1883, I served a true copy of the within citation, and the accompanying supplemental petition of pl'ff, with interrogaties, and order of court thereof, together with notices of garnishee, on the Louisiana National Bank, of New Orleans garishees herein, by handing the same to Joseph H. Oglesby in person, in the city of New Orleans, the president of the aforesaid National Bank.

(Signed) J. R. G. PITKIN,
U. S. Marshal, East. Dist. of La.
By E. S. CURRY,
D'y U. S. Marshal.

158 UNITED STATES OF AMERICA,
Eastern District of Louisiana:

Circuit Court of the United States, Fifth Circuit, and Eastern District of Louisiana.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 8825.

To the New Orleans National Bank, garnishee:

You are hereby cited to declare on oath what property or effects

belonging to the defendant in this case you have in your possession or under your control, or in what sum you are indebted to said defendant; and also to answer in writing, under oath, the interrogatories annexed to the petition, of which a copy accompanies this citation, and deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, within ten days after the service hereof; otherwise judgment will be entered against you for the amount claimed by the plaintiff, with interest and costs.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the City of New Orleans, this 29th day of May, A. D. one thousand eight hundred and eighty-three, and of the Independence of the United States of America the 107th year.

Teste:

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

159 *Marshal's Return.*

Received May 29th, 1883, by the U. S. marshal, and on May 29th, 1883, I served a true copy of the within citation and accompanying copy of supplemental petition, interrogatories, and order of court thereon, together with notices of garnishee, on the New Orleans National Bank of New Orleans, garnishees herein, by handing the same to Albert Baldwin, Esq., in person, in the city of New Orleans, the president of the aforesaid bank.

(Signed) J. R. G. PITKIN,
— East. Dist. of La.
By E. S. CURRY,
D'y U. S. Marshal.

160 UNITED STATES OF AMERICA,
Eastern District of Louisiana:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 8825.

To B. T. Walshe, as city treasurer and individually, garnishee:

You are hereby cited to declare on oath what property or effects belonging to the defendant in this case you have in your possession or under your control, or in what sum you are indebted to said dedefendant, and also to answer in writing under oath the interrogatories annexed to the petition of which a copy accompanies this citation, and deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, within ten days after the service hereof; otherwise judgment will be entered against you for the amount claimed by the plaintiff, with interest and costs.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 29th day of May, A. D. one thousand eight hundred and eighty-three, and of the Independence of the United States of America the 107th year.

Teste:

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

161 *Marshal's Return.*

Received May 29th, 1883, by the U. S. marshal, and on May 29th, 1883, I served a copy of the within citation and the accompanying supplemental petition of pl'ffs, together with interrogatories and order of court thereon, with notices of garnishee on B. T. Walshe, individually and as treasurer of the city of New Orleans, and garnishee herein, by handing the same to him in person in the city of New Orleans.

(Signed) J. R. D. PITKIN,
U. S. Marshal, East. Dist. of La.,
By E. S. CURRY,
D'y U. S. Marshal.

162 UNITED STATES OF AMERICA,
Eastern District of Louisiana:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

MYRA C. GAINES
vs.
CITY OF NEW ORLEANS. } No. 8825.

To W. J. Behan, Mayor of the City of New Orleans and individually, garnishee:

You are hereby cited to declare on oath what property or effects belonging to the defendant in this case you have in your possession or under your control, or in what sum you are indebted to said defendant, and also to answer in writing under oath the interrogatories annexed to the petition of which a copy accompanies this citation, and deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, within ten days after the service hereof; otherwise judgment will be entered against you for the amount claimed by the plaintiff, with interest and costs.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 29th day of May, A. D. one thousand eight hundred and eighty-three, and of the Independence of the United States of America the 107th year.

Teste:

[SEAL.] (Signed) F. A. WOOLFLEY,
Clerk.

163 *Marshal's Return.*

Rec'd, May 29th, 1883, by the U. S. marshal, and on May 29th, 1883, I served a true copy of the within citation and the accompanying supplemental petition of pl'ff, with interrogatories and order of court thereon, together with notices of garnishee, on William J. Behan, individually and as mayor of the city of New Orleans, defendant herein and garnishee, by handing the same to him in person in the city of New Orleans.

(Signed) J. R. G. PITKIN,
U. S. Marshal, East. Dist. of La.,
By E. S. CURRY,
D'y U. S. Marshal.

164 *Answer of New Orleans National Bank, Garnishee, to Interrogatories. Filed May 31st, 1883.*

U. S. Circuit Court, East. Dist. of La.

MYRA CLARK GAINES *vs.* CITY OF NEW ORLEANS. } No. 8825.

And now comes the New Orleans National Bank, through Albert Baldwin, pres't, and for answer to the interrogatories herein propounded to it says:

To the 1st int'y it says no.
To the 2d " it says no.
To the 3d " it says no.
To the 4th " it says no.

Wherefore defendant prays that it be hence dismissed, with costs, and for general relief.

(Signed) ALBERT BALDWIN.
F. L. RICHARDSON, *Solicitor.*

Sworn to and subscribed before me, at New Orleans, on this 31st May, 1883.

(Signed) GEO. W. CHRISTY,
Not. Pub.

Answer of W. J. Behan, Mayor, Garnishee.

Circuit Court of the United States, East. Dist. of La.

MYRA C. GAINES *vs.* THE CITY OF NEW ORLEANS.

165 And now appears W. J. Behan, mayor of the city of New Orleans, in his said capacity and individually, and for answer to the interrogatories herein propounded says as follows:

To int. first he answers no.
To int. second he answers no.
To int. third he answers no.
To int. fourth he answers no.

And further generally answering, and qualifying the foregoing answers, he says that neither individually nor as mayor has he

possession or control of any property, credits, or money of the city of New Orleans; that the funds, moneys, and revenues of the city of New Orleans are deposited to her credit according to law with the fiscal agent, an incorporated bank, from which it may be withdrawn on the joint check of the mayor, the treasurer, and the comptroller, but no check can be drawn against said moneys except in execution of the orders of the city council or the payment of appropriations made by resolution or ordinance of the council. And for
166 answer and explanation of his answer to int. fourth relative to a certain sum of forty thousand dollars paid to the city by L. & N. R. R. Co., under ord. 8079, A. S., deponent refers to and adopts as his answer that of B. T. Walshe, city treasurer, this day filed, and which he has read.

And further deponent saith not.

(Signed) W. J. BEHAN, *Mayor.*

Sworn to and subscribed before me, this June 7, '83.

(Signed) W. O. HART, *Not. Pub.*

Answer of B. T. Walshe, treasurer, garnishee. Filed June 8th, 1883.

Circuit Court of the United States, Fifth Circuit and Eastern Dist. of La.

MYRA C. GAINES *vs.* CITY OF NEW ORLEANS. } No. 8825.

And now appears B. T. Walshe, as treasurer of the City of New Orleans and individually and for answer to the interrogatories herein propounded to [him] says, as follows:

To int. first. No; except as hereinafter explained.

" " second. No; " " " "

" " third. No; except as hereinafter explained.

To int. fourth. No; except as hereinafter explained.

167 And for further answer, explaining and qualifying the foregoing, he says: That neither individually, or as treasurer, has he possession or control of any property, money, or credits, belonging to the City of New Orleans; that as treasurer it is his duty to deposit all moneys, revenues, funds, etc., coming into his hands with the fiscal agent of the City of New Orleans, an incorporated bank, to the credit of the city; and after such deposit he has no control over it, except that, under the law, same can be withdrawn on the joint check or order of affiants, the mayor of the City of New Orleans and the comptroller, but no such check can be drawn except in execution of the orders of the city council, or for the payment of appropriations made by resolution or ordinance of the council, and, referring specially to int. 4th, in regard to the $40,000 paid by the L. & N. R. R. Co., affiant says that he has not the same in his possession or control, except in the same manner and to the same extent
168 to which he as treasurer is charged with the receipts and disbursements of the moneys of the City of New Orleans from whatever source derived.

That he did in his then capacity of administrator of finance receive from the Louisville and Nashville R. R. Co., in accordance with the terms of Ordinance No. 8079 and the agreement thereunder, made before S. Flower, N. P., the sum of forty thousand dollars and deposited the same, as he was bound to do according to law, with the fiscal agent of the City of New Orleans.

Affiant, further answering, says that the city and himself, as administrator of finance, were immediately thereafter notified by the board of liquidation of city debt that the ordinance 8079 and the agreement thereunder were unauthorized and *ultra vires*, and that the whole subject-matter vested by operation of act No. 133 of the acts of session of 1880 in said board of liquidation instituted legal proceedings to annull said settlement and compromise proceedings, made part hereof, being now pending in this hon. court, suit
169 being No 10180 of the docket thereof, entitled The Board of Liquidation *vs.* The Louisville & Nashville R. R. Co., *vs.* The City of New Orleans, in which suit the city answered that she held the forty thousand dollars to be restored to said L. & N. R. R. Co. should it be decided that said compromise was illegal and null and void.

Further answering, affiant says that he is informed that a resolution to rescind said compromise and repeal the ordinance 8079, A. S., and to tender said forty thousand dollars to the L. & N. R. R. Co. is now pending for final action before the city council, which resolution was offered before the garnishment process herein was issued or served.

Said ordinance 8079, said suits No. 10180, and said resolution to rescind are made part of this answer.

And, for further answer, affiant says that under no circumstances is said sum of forty thousand dolllars subject to seizure under execution herein; if said compromise is annulled the forty thousand
170 dollars must be returned to the Louisville and Nashville R R. Co., if it is maintained and not successfully rescinded by the city, then the said forty thousand dollars became part of the public funds and property of the City of New Orleans, dedicated by operation act No. 81, acts of 1882, to works of public improvement of a permanent character, or it may be applied to the payment of the bonded debt of the city under act No. 133, acts of 1880, or it remains with and falls into the general fund of receipts, revenues of the city for the year 1882, applicable to the alimony of the government, and in no event can it become or be held a private asset free from all public dedication or destination, and therefore not liable to seizure:

(Signed) B. T. WALSHE.

Sworn to and subscribed before me this 8th day of June, A. D. 1883.

(Signed) J. D. TAYLOR, *Not. Pub.*

171 *Answer of The Louisiana National Bank. Garnishee. Filed June 8th, 1883.*

U. S. Circuit Court.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 8825.

Now comes Joseph H. Oglesby, the president of the Louisiana National Bank, and answers as follows to the interrogatories propounded to said bank as the garnishee herein:

To the first interrogatory affiant answers no, save and except as hereinafter stated at and from the date of the service of the interrogatories herein, there was, and is still, on deposit in the Louisiana National Bank to the credit of and subject to the control of the board of liquidation of the city debt created under the act No. 133 of the Legislature of Louisiana, applicable only to the purposes hereinafter stated, the sum of nineteen thousand one hundred dollars, all of which sum is derived from the premium bond taxes levied by the City of New Orleans in accordance with the
172 act No. 31 of 1876, to provide for the principal and interest of the prem-um bonds of the city and prem um thereon included in the several allotments of series of said bonds and premiums fixed for payment and redemption for the current year, 1883, by the ordinances adopting the premium-bond plan and said act, the amount of said bonds and premiums to be paid and redeemed from and out of said taxes during the current year, being six hundred and eighty-two thousand seven hundred and fifty dollars of bonds and one hundred thousand dollars of premiums, said prem-um bonds now extant and held by holder for value, and amounting to and constituting eight millions five hundred thousand dollars of the bonded debt of this city, and all of said amount now on deposit, as well as all the residue of said premium bonds; tax levied for the current year and yet to be collected being absolutely required for the payment of the said series of premium bonds, interest, and premium fixed by said act and plan for redemp-
173 tion during the current year; the surplus, if any, to be devoted to the purchase of outstanding bonds; said amount now being deposited (in the said Louisiana National Bank, the fiscal agent of the board, and held by this board as directed by said act No. 31, of 1876, act No. 58, of 1880, and the act No. 133, of 1880) solely for the said purposes directed by said act of 1876, and especially the 6th section thereof, said acts being specially referred to for fuller explanation and greater certainty; and no portion of said sum is applicable to pay the judgment of the plaintiff herein, but all said amount now on deposit is absolutely exempt and protected from any seizure by the creditors of the city, because derived from and constituting said public taxes essential to carry on the government, levied and exclusively applicable to pay the bonded debt of the corporation as herein stated, one of the chief objects for which municipal government is established and taxes are imposed.

Further answering, affiant says that at and prior to the date of the service of the interrogatories there was, and is still, de-
174 posited in the said Louisiana National Bank the sum of fifteen thousand three hundred dollars; all of which said sum is derived from and constitutes the taxes of the City of New Orleans, levied under the laws to defray the expenses of the police, the public schools, the lights of the city, the salaries of the officers of the city government, and for other expenses of maintaining and carrying on the government of the city; all said sums *is* liable to seizure under the plaintiff's execution because decreed from and forming the public taxes levied and required to support and carry on the municipal government, and is its alimony.

To the second interrogatory this affiant answers no, save and except as it is stated in the answers to the first and fourth interrogatories.

To the third interrogatory affiant answers no.

To the fourth interrogatory affiant answers: At and prior to the date of the service of the interrogatories herein there was and still is deposited in the said Louisiana National Bank the sum of forty thousand dollars, received by the City of New Orleans from
175 the Louisville & Nashville Railroad Company, under the agreement, herewith filed and made part hereof as Exhibit "A;" that the city should ratify and confirm to the New Orleans, Mobile and Texas Railroad Company, reorganized, and to the Louisville and Nashville Railroad Company for said sum of $40,000.00, the grants to the New Orleans, Mobile and Chattanooga Railroad Company, by the acts of the Legislature of Louisiana, No. 26, of 1869, and No. 31, of 1870, and other acts, of certain batture property of the city, set forth in said acts of 1869 and 1870, should acquiesce in the judgment rendered by the U. S. circuit court maintaining said grants in the suit of the New Orleans, Mobile and Texas Railroad Company *vs.* The City, and should dismiss the appeal taken by the city from the judgment then and now still pending in the Supreme Court of the United States, all of which more fully appears by said legislative acts, said judgment and said agreement specially referred to for fuller explanation and
176 greater certainty; and it was for the consideration that the city would confirm said grants, acquiesce in said judgment, and dismiss said appeal, that said sum now on deposit was paid, but the said city has not fulfilled said agreement and secured to the company the consideration aforesaid, because, as soon as said agreement became known, the board of liquidation of the city debt, created under the act No. 133 of 1880, with the powers defined in said act specially referred to for fuller explanation and greater certainty, on the 15th October, 1882, entered in said suit on appeal to the United States Supreme Court, opposed the dismissal of said appeal, and asserted its rights to the property sought to be granted by said acts of 1869 and 1870, said property being to the extent shown by the Exhibit B herewith filed as part hereof, being squares of ground of this city not dedicated to public use, conveyed to said board of

liquidation by said act of 1880, and by the later act of 1882,
177 number 58, also specially referred to for fuller explanation and greater certainty, to be sold and applied by the board to pay the bonded debt of the city, which opposition was maintained and the dismissal of the appeal which the city had undertaken to effect under said agreement was denied by the Supreme Court of the United States, its order being that the appeal be maintained until the proper suit to test the validity of said agreement under which the said $40,000.00 was paid, should be brought and prosecuted to judgment by the board, all of which more fully appears by said order of the Supreme Court herewith filed as part hereof, marked Exhibit "C."

And this affiant, further answering, shows that in accordance with said order the board of liquidation is now prosecuting said suit to have said property, the subject of said agreement, decreed to be the property of the board for the purposes of the trust credit by said acts of 1880 and of 1882, to be recognized as entitled to prosecute said appeal, and to have said agreement decreed to be void
178 and of no effect, for and because the city had no capacity to deal with said property as it proposed in such agreement, but that the board alone had the power of sale thereof to pay the bonded debt for that purpose, and to that end was vested with sole control of said property, when the city undertook in said agreement to confirm to said company the grants of said property, to acquiesce in the judgment maintaining the grants, and to dismiss the appeal from said judgment, which suit is No. 10180 of the docket of this court, to the pleadings in which to show the issues involved special reference is made for fuller explanation and greater certainty.

Affiant, further answering, shows that prior to the service herein of the interrogatories, the city council had under consideration the said agreement of compromise with a view to legal proceedings to set aside, and resolutions to that effect have been introduced in that body, as appears by copy of said resolution herewith filed, marked D; that by reason of said proceedings by the board the said
179 forty thousand dollars has not been used by the city, has been since the 15th of October, 1882, and is now still deposited in the said Louisiana National Bank to abide the issue of said legal proceedings touching said agreement; that the city has answered in said suit by the board that it held said funds, subject to the decision thereon, to be returned to the said Louisville and Nashville Railroad Company in the event said agreement should be annulled by the decree in said suit, and affiant shows that said agreement under which said forty thousand dollars was received by the city not having been fulfilled by the city resolutions, being pending before the city council to authorize proceedings by the city to set aside said agreement of compromise, and the validity of said compromise being at issue in said suit by the board, the said sum is not subject to seizure under plaintiff's execution, but must remain on deposit to abide the decision on said pending suit, which, if against said agreement, will determine the city never had any right to said fund or to receive it.

180 Affiant, further answering, shows that said acts No. 133 of 1880 and said act No. 68 of 1882 make a destination of all property of this city to the payment of its bonded debt, now exceeding fourteen million dollars; that the said fund of forty thousand dollars would be controlled by said destination, and would not be subject to seizure for the debts of the city, even if said agreement of compromise were maintained in said suit, and the fund retained by the city, and, save and except as above stated, this affiant answers no to the said fourth interrogatory.

(Signed) J. H. OGLESBY.

Sworn to & subscribed before me, this 8th June, A. D. 1883.

(Signed) J. A. CHARBONNET,
Comm'r U. S. Cir. Court, E. Dist. of La.

EXHIBIT A. Filed with answer of Louisiana National Bank, garnishee. Compromise and settlement, city of New Orleans with Louisville and Nashville R. R. Co. and N. O., M. & T. R. R. Co. (reorganized).

181 STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

Be it known that on this eleventh day of October, in the year of our Lord one thousand eight hundred and eighty-two, before me, Samuel Flower, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared the Honorable Joseph A. Shakespeare, mayor of the city of New Orleans, herein acting in such capacity, under and by virtue of the authority in him vested by ordinance No. 8079, administration series, adopted by the council of the city of New Orleans at a meeting held on this eleventh day of October, A. D. 1882, a duly certified copy of which is annexed to this act, and incorporated as part hereof, who declared that he acknowledges to have received from Thomas L. Bayne, Esq., attorney for the Louisville and Nashville Railroad Company, and for it and the New Orleans, Mobile and Texas Railroad Company, reorganized, the sum of forty thousand
182 dollars, and for and in consideration of said sum the City of New Orleans does, by these presents, compromise and settle all of the matters in controversy and the suit of the City of New Orleans *versus* The New Orleans, Mobile and Texas Railroad Company, and, pending in the Supreme Court of the United States, an appeal by the City of New Orleans from the judgment of the circuit court of the United States ordered on the eleventh day of June, 1878, affirming the judgment of the supreme court of Louisiana, and of the eighth district court of the parish of Orleans, in favor of said railroad company, dismissing the appeal acquiescing in the judgments rendered in favor of said company and confirming and securing to the said New Orleans, Mobile and Texas Railroad Company reorganized, and the Louisville and Nashville Railroad Company, the rights, grants, occupancy, and privileges heretofore granted by the city of New Orleans, and grants made and confirmation of the

same by the State of Louisiana by acts of the Legislature No.
183 28, of 1868; Nos. 26 and 67, of 1869, and No. 31, of 1870; all as set forth in the propositions recited in the preamble to the above mentioned and annexed ordinance, No. 8079, as and in said ordinance hereby making full compromise and settlement and granting and confirming all the rights and privileges therein described.

And also personally came and appeared herein the said Thomas L. Bayne, attorney of and for said railroad company, and in the name and on behalf of said companies accepts the same.

Thus done and passed at the city of New Orleans, in the presence of E. L. Bower and A. E. McConnell, competent witnesses residing in said city, who hereunto subscribe their names, together with the said appearers and me, notary, the day, month, and year first above written.

(Original signed) JOS. A. SHAKSPEARE, *Mayor.*
THOS. L. BAYNE.

[Witnesses:]
D. L. BOWER.
A. E. McCONNELL.

SAM'L FLOWER,
184 *Notary Public.*

I hereby certify the above and foregoing to be a true and correct copy of the original on file and of record in my office.

New Orleans, June 7th, 1883.

(Signed) [SEAL.] SAM'L FLOWER,
Notary Public.

Exhibit B, filed with answer of Louisiana National Bank, is a plan, a copy of which is hereto annexed.

(Here follows diagram marked p. 185.)

185 EXHIBIT "C." Filed with answer of Louisiana National Bank, Garnishee.

Supreme Court of the United States. October Term, 1882.

THE CITY OF NEW ORLEANS, Appellant,
vs.
THE NEW ORLEANS, TEXAS AND MOBILE RAILROAD COMPANY. } No. 17.

On motion Mr. Chief Justice Waite delivered the opinion of the Court.

This case was continued on the application of the parties on the 10th of October. The appellee now presents a stipulation for the dismissal of the appeal, signed by the city attorney of New Orleans, pursuant to the terms of a compromise of the matter in dispute made with the city council, and asks to have the appropriate order entered upon that stipulation. The board of liquidation of the city debt of New Orleans appears to resist the entry of any such order on
186 the ground that during the pendency of the appeal in this court authority over the subject-matter of the controversy has

been transferred from the city council to that board, and that the compromise which has been effected is not binding.

The board also asks permission to prosecute the appeal in the name of the city.

It is conceded that the city council made the compromise which is claimed and that the appellee is entitled to a dismissal of the appeal if the council had authority to do what it has done and the compromise was fairly made. The dispute is as to the authority of the council, and presents questions too important to be settled summarily on these motions.

It is therefore ordered that the cause and pending motions be continued until the next term, and that the appeal be then dismissed, in accordance with the stipulation on file, unless the board of liquidation begin and prosecute without unnecessary delay, in some court of competent jurisdiction, and appropriate proceeding to set aside the compromise which has been made with the city council.

187 EXHIBIT D. Filed with answer of Louisiana National Bank, Garnishee.

Proceedings of City Council.

The city council held its regular weekly meeting last night, Mayor Behan in the chair, and a quorum present.

* * * * * * *

By the committee on public order—

That ordinance No. 8079, A. S., adopted October 11, 1882, authorizing and directing the mayor of the city of New Orleans to accept the proposition made to compromise and settle with the New Orleans, Mobile and Texas railroad certain matters of controversy by which the city agreed to dismiss an appeal in the case of the City of New Orleans *vs.* The New Orleans, Mobile and Texas Railroad Company, No. 144 of the docket of the Supreme Court of the United States, and the same is hereby repealed and the contract signed, rescinded, and declared null, and the $40,000.00 received by the city shall be restored to the said company, and if the company refuses to accept such tender, that such legal proceedings as may be
188 necessary be instituted.

* * * * * * *

Rule to set Aside Answers of Louisiana National Bank and B. T. Walshe. Filed June 12th, 1885.

U. S. Circuit Court, East. Dis't of La.

MYRA CLARK GAINES } *vs.* CITY OF NEW ORLEANS, } No. 8825.

On motion of Wm. Reed Mills, A. Goldthwaite and J. Ward Gurley, Jr., Esquires, and on suggesting to the court that the answers of the Louisiana National Bank, through J. H. Oglesby, its president,

and of B. T. Walshe, city treasurer, and B. T. Walshe individually, are untrue and insufficient in law and are denied by complainant to traverse the same:

It is ordered by the court that the said Louisiana National Bank, by its president, J. H. Oglesby, and B. T. Walshe as city treasurer and individually, do show cause on Monday, the 18th day of June, 1883, at 11 o'clock a. m., why their said answers should
189 not be set aside, and they and each of them should not be adjudged to pay to this appearer the sum of forty thousand dollars in their or his possession belonging to the city of New Orleans.

Marshal's Return.

Received June 13th, 1883, by the U. S. marshal and I served a true copy of the within rule on the parties herein named in the following date and manner, to wit: Louisiania National Bank of New Orleans, personally on Joseph H. Oglesby, Esq., president of said bank, June 13th, 1883; B. T. Walshe, Esq., individually and as treasurer of the city of New Orleans, personally, June 13th, 1883.

(Signed) E. S. CURRY,
D'y U. S. Marshal.

Petition of Intervention of Mrs. Sarah M. King. Filed June 18th, 1883.

To the honorable the judges of the circuit court in and for the fifth circuit and eastern district of Louisiana:

190 The petition of Sarah M. King, testamentary executrix of the late W. W. King, a resident of the city of New Orleans, respectfully shows:

That the succession of the late W. W. King, her deceased husband, has been duly opened in the civil district court for the parish of Orleans, and that petitioner has duly qualified as testamentary executrix thereof. Petitioner represents that the late W. W. King was employed as special counsel to represent the City of New Orleans in a certain case entitled New Orleans, Mobile & Texas R. R. Co. *vs.* City New Orleans in this hon. court; that the deceased tried said case in this hon. court and appealed the same to the Supreme Court of the United States; that it was there entitled The City of New Orleans *vs.* The Louisville and Nashville Railroad Co. and numbered 149 on the docket of said court; that on the 22d day of March, 1879, the City of New Orleans, by ordinance No. 4963, A. S. contracted to pay to the said W. W. King the sum of one thousand dol-
191 lars, contingent upon the success of said suit, for services rendered and to be rendered in the Supreme Court of the United States; that the said W. W. King prepared the transcript of appeal, appealed said case, and rendered services in the Supreme Court; that the said appeal from said judgment was of benefit to the city of New Orleans, and was successful; that in said case, and conditioned upon the dismissal of the appeal, the city of New Orleans received from the Louisville and Nashville Railroad Co. the sum of forty thousand dollars ($40,000); that there is due to the succession of W. W. King

the said sum of one thousand dollars; that for the payment of said sum petitioner, in her capacity aforesaid, under the law of Louisiana, has a first lien and privilege upon said sum of forty thousand dollars; that petitioner has said privilege by virtue of sec. 128 of the Revised Statutes of Louisiana.

Now, petitioner alleges that said sum of forty thousand dollars deposited in the Louisiana National Bank of Louisiana has
192 been seized in the suit of Myra Clarke Gaines *vs.* The City of New Orleans in this hon. court: that petitioner is desirous of intervening herein, and that the said lien and privilege be recognized and ordered paid out of said sum.

Wherefore petitioner prays leave to file this petition of intervention in said suit; that judgment be rendered in favor of the succ. of W. W. King, recognizing said lien and privilege upon said sum, and ordering that petitioner be paid the said sum of one thousand dollars out of the forty thousand dollars seized herein and received from the Louisville and Nashville Railroad Co. in preference to all creditors; that citation issue for costs and general relief.

(Signed) FRED. D. KING, *Atty.*

Let this petition of intervention be filed as prayed for.
June 18, 1883.

(Signed) EDWARD C. BILLINGS, *Judge.*

Service accepted.

(Signed) C. F. BUCK, *City Atty.*
(Signed) J. WARD GURLEY, JR.

193 *Answer to Petition of Intervention of Mrs. Sarah M. King. Filed June 18th, 1883.*

U. S. Circuit Court, East. Dist. of La.

MYRA CLARK GAINES *vs.* CITY OF NEW ORLEANS. } No. 8825.

On the petition and intervention of Mrs. Sarah M. King, testamentary executrix of W. W. King.

And now comes the complainant, by her solicitors, and files for her answer thereto a general denial, and requires strict proof thereof.

(Signed) W. REED MILLS,
A. GOLDTHWAITE,
J. WARD GURLEY, JR.,
Sol's for Respondent to Petition.

Motion to Quash Execution, &c., &c. Filed June 18th, 1883.

To the hon. the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

On motion of C. F. Buck, city attorney, and J. R. Beck-
194 with, of counsel, in said capacity appearing for the defendant, the City of New Orleans:

It is ordered that Myra C. Gaines, through her solicitors or otherwise, shew cause on the — day of ——, 1883, or on such day and in such manner as the court may order, why the writs of *fi. fa.* herein issued, and all proceedings thereunder had and attempted, to seize the property of the defendant by garnishment process or otherwise, and all proceedings in execution of the decree herein rendered; should not be quashed, annulled, and set aside for the following reasons, to wit, and others:

1st. That on the 15th day of May, within ten days from the date of rendition of the judgment and decree, mover obtained an order for appeal with the view of having said appeal to operate a supersedeas to said decree and suspend execution thereon or thereof, and appellant, this mover, is entitled to a delay of sixty days from the rendition of said decree to furnish bond, or otherwise comply with the conditions of the order for supersedeas, and during said
195 sixty days no writ of *fir. fa.* can issue, or any proceedings in execution taken.

Second. The issuance of the writ of *fi. fa.* against the City of New Orleans in execution of judgment, is expressly prohibited by statute, to wit, the act No. 5 of Acts of E. S. of 1870, and said statute and and all State laws appertaining to the execution of judgments are binding and obligatory on this court by express legislation of the Congress of the United States.

Third. In the event it should be held that said acts of Congress adopting the State practice is not applicable to a suit in equity, then there is no warrant in law or the rules of this court for the garnishment proceedings herein attempted.

Wherefore defendant, said City of New Orleans, prays, after due hearing of this motion, that it be decreed that said writ of execution issued without warrant of law, that same should be quashed and set aside, and all proceedings thereunder had declared null and void, and all further proceedings in execution of said judgment in
196 the manner attempted by writ of *fi. fa.*, stayed and prohibited.

And reserving this motion to have said proceedings decreed null and void, as issued without authority of law, and in the event same is overruled, and not otherwise, this mover shows and suggests that, even if said writ of *fi. fa.* issued legally, the proceedings against the garnishees herein, on rule to traverse, should be annulled and prayer for judgment against them refused, for the reason that there is no valid and legal seizure of any moneys of the City of New Orleans, defendant in execution, in the hands of said garnishees; that the City of New Orleans, defendant herein, is a municipal corporation, and said pretended garnishees, the mayor, the treasurer, and the Louisiana National Bank, by law constituted "fiscal agent," are not "third persons" as to said city, but officers and agents of said corporation; that whatever moneys they, or any of them, hold is held by them in their official capacity as legal custodians
197 or receiving and disbursing officers, receiving and disbursing the funds of the corporation, as prescribed by law or the ordinances of the city administration, without any personal control or possession thereof.

That a notice of seizure served on garnisees as herein attempted did not, and does not, effect or operate a seizure of any funds in their hands, because they are not "third parties" in the sense of the law relative to garnishment of property of a defendant in execution in the hands of third persons. And mover further shows and suggests, if it should be held that these attempted seizures by garnishment in the hands of the city treasurer and fiscal agent are in other respects lawful and valid, that by nature, derivation, and destination all moneys in the custody of the garnishees, or either of them, are exempt from seizure, being the public moneys, funds, and revenues of the corporation derived from taxation, licenses, and other sources of municipal receipts and income to defray municipal expenses, or be applied to such purposes of municipal government as the law directs or the city council may order.

And referring specially to the fund of forty thousand dol-
198 lars attempted to be seized herein, derived as the consideration of a certain agreement with the L. & N. R. R. Co., executed on or about the 11th of October, 1883; the nature and purpose of which is fully set forth in garnishees' answer, for the purpose of describing same more fully made part hereof, mover shows and suggests that there is pending in this hon. court a suit, wherein the board of liquidation of the city debt, created under act No. 133, acts of 1880, is plaintiff and the Louisville and Nashville R. R. Co., defendant, being No. — of the docket of this U. S. circuit court, wherein said board of liquidation assails the validity of said agreement on the ground, among others, that the subject-matter of the agreement was out of the power of municipal administration, and if said pl'ff is successful said agreement must be annulled, and said sum of forty thousand dollars restored to said defendant, and your mover, the City of New Orleans, is a party defendant to said suit, and her answer raising or setting up no special pleas or defences submits the question of her authority in the premises
199 to the court for decision, and avers that pending said litigation she will hold, subject to the order of the court or the defendant, the L. & N. R. R. Co., said sum of forty thousand dollars ($40,000), and for these reasons said board of liquidation and said Louisville and Nashville R. R. Co. are necessary parties to rule herein to traverse the answers of garnishees, and to this motion; and mover shows and suggests further, prior to the attempted seizure herein, to wit, on Tuesday, April —, a resolution was introduced in the city council—now pending on certain amendments for final action, a copy of which is annexed to answers of garnishees and made part hereof—to annull and rescind said agreement and repeal ordinance 8079 A. S., under which it was executed; that said resolutions were offered in good faith so far as the pretended seizing creditor is concerned, and with no intent to defeat a seizure; that a rescision involves a tender and return to the L. & N. R. R. Co. of the said sum of forty thousand dollars, and the action of the city counsel cannot and should not be embarrassed in the
200 premises by a seizure or attempted seizure of said fund.

And mover finally shows and suggests that in no event

and under no circumstances is said fund of forty thousand dollars subject to seizure under execution of an ordinary judgment against the City of New Orleans; that same are derived as proceeds or consideration for the grant of certain licenses, permissions, privileges, etc., to said L. & N. R. R. Co., and especially as consideration for the consent on the part of the City of New Orleans to allow an injunction which had been obtained restraining the city from interfering by physical violence with the works & buildings of said L. & N. R. R. Co. to become final and perpetual, and to allow said company to enjoy unmolested by the city the various grants of privileges, etc., conferred by the Legislature on said company by various legislative acts passed in the session of 1869 and 1870.

That said ordinance granting this consent, acquiescence, and ratification, was purely and entirely an act of public political administration and the proceeds thereof (in consideration) said forty thousand dollars enured to the benefit of the public treasury, to be used in discretion of the municipal government for such legal and proper purposes within its power, as in its discretion it may deem fit and proper, unless it be affected by the legislative dedication prescribed by act No. 81, of the act of 1882, entitled an "Act to authorize the City of New Orleans, in the sale or lease of franchises and other privileges, etc., to apply price thereof to public improvement, etc.; and in neither event is it subject to seizure at the hands of ordinary creditors.

Wherefore this mover prays that said board of liquidation and the Louisville and Nashville R. R. Co. be made parties to the proceeding or rule, traversing the answer of garnishees; and mover prays, further, if the motion, as hereinbefore presented, to quash execution be denied, that it be decreed and held that under the garnishmen- proceedings, nor in any other manner there is no valid seizure of any money or rights belonging to the City of New Orleans; but in the event it should be held that both the writ of *fi. fa.*, and all proceedings thereunder are valid, and that there is a valid seizure of said forty thousand dollars, then this mover prays that in the manner and at the time hereinbefore stated, it be decreed contradictorily with said seizing creditor; that said sum of forty thousand dollars derived from the act of compromise with the L. & N. R. R. Co., as set forth, is not subject to seizure; that the power and authority to deal with the subject, especially in regard to the rescision of the contract; is in no manner affected; and that the seizure or attempted seizure of said funds be decreed null and void, and the seizure quashed and set aside.

And mover prays that this motion be set down for trial, and all parties notified; and that all proceedings against said garnishees be stayed until this motion shall be finally passed on, and as in duty bound, &c., &c.

(Signed) C. F. BUCK, *City Att'y.*
J. R. BECKWITH,
Of Counsel.

Service accepted and notice waived.
(Signed) W. REED MILLS,
A. GOLDTHWAITE,
J. WARD GURLEY, JR.,
Sol'rs for Compl't.

Bill of Exceptions on Traverse to Answer of Garnishees. Filed June 18th, 1883.

U. S. Circuit Court, Eastern Dist. of La.

MYRA C. GAINES *vs.* CITY OF NEW ORLEANS.

Bill of Exception.

Be it remembered, on the trial of the rule on the garnishees, the answers of the garnishees being read, and the plaintiff in the rule having produced as the testimony of Joseph H. Oglesby to support the traverse, whose testimony appears in the record of this cause, and no other testimony being produced in support of said
204 traverse, thereupon the counsel for the city and the garnishees requested the court to hold said answers conclusive and dismiss the said rule, but the court refused so to decide and dismiss the rule, to which refusal so to decide the counsel for the city and said garnishees excepted, and tendered this bill of exceptions for signature.

June 18th, 1883.
(Signed) EDWARD C. BILLINGS, *Judge.*

Testimony of J. H. Oglesby, &c., Referred to in Foregoing Bill of Exceptions.

United States Circuit Court, Fifth Circuit, Eastern District of La.

MYRA CLARK GAINES *vs.* CITY OF NEW ORLEANS. } No. 8825.

Testimony taken in open court on trial of traverse of answers of the garnishees, and on the intervention of Mrs. Sarah M. King, together with offering by the respective parties on hearing of said traverse and intervention, and of the defendant's motion to
205 quash, this 18th day of June, A. D. 1883.

On the motion to quash on behalf of the city, Mr. Buck offers in evidence act No. 5 of the acts of 1870 of the Legislature of the State of Louisiana, extra session.

2. Also the answers of the garnishees, particularly those of Joseph H. Oglesby, president of the Louisiana National Bank, and B. T. Walshe, treasurer of the city, and W. J. Behan, mayor.

3. All the documents and exhibits annexed to these answers, particularly the compromise settlement between the City of New Orleans and the Nashville R. R, Co., before Samuel Flower, notary public, October 11, 1882.

4. Also the ordinance now pending before the city council, relative

to the rescis-ion of this compromise, offered on or before April 22, 1883, before the council.

5. Exhibit D, offered as an amendment to the above April 29, 1883.

6. Act No. 133 of the acts of 1880, creating the board of
206 liquidation.

7. Also the record in the suit of the Board of Liquidation *versus* The Louisville and Nashville R. R. Co., No. 10180 of this court, particularly the answer.

8. Also the record in the case of the Louisville and Nashville R. R. Co. against the City of New Orleans, pending in the Supreme Court of the United States as No. 17 of the docket thereof, being No. 7992 of this court, being the suit purporting to be compromised by the ordinance of the city council, No. 8079, of the act of October 11, 1882, already offered.

9. Also a certified copy of the opinion and order of the Supreme Court of the United States, annexed to the answer of the garnishees, the Louisiana National Bank, in the case No. 17 of the Supreme Court of the United States.

10. Also the motion and order for writ of error by the city in suit No. 8825 of this court, as also the final decree in said case.

207 *On the Intervention of Mrs. Sarah W. King.*

1. Mr. King offers in evidence the letters testamentary showing that the succession of W. W. King has been opened, and the appointment of Mrs. S. W. King as testamentary executrix.

2. Also the ordinance No. 4963, administration series, showing the contract to pay W. W. King $1,000.

3. Fred. D. King, being sworn, says that the late W. W. King took an appeal in the case now known as No. 17 of the docket of the Supreme Court of the United States to that Court; that he superintended the transcript of appeal, and filed the same; that he attended to said case in the Supreme Court of the United States up to the time of his death, in March, 1881; that no other counsel was employed in said case; that said case was compromised, and the City of New Orleans received from the same the sum of $40,000,
which sum was deposited in the Louisiana National
208 Bank; that said W. W. King has never, nor his succession never, received any proportion of the said fee of $1,000; that said claim has never been disputed by the City of New Orleans, but has been recognized; that said $40,000 deposited in the Louisiana National, and seized herein, were derived from the said case of the City of New Orleans against the Louisville and Nashville R. R. Co., being No. 144, now No. 17, of the docket of the Supreme Court of the United Ltates,

Complainant offers the exhibit C attached to the answer of the Louisiana National Bank, in the case No. 8825, which applies only to the intervention of Mrs. W. W. King. Also the answer of the board of liquidation.

JOSEPH H. OGLESBY, being sworn in traverse, says:

By Mr. GOLDTHWAITE:

Q. You are the president of the Louisiana National Bank?

A. I am

209 Q. Have you knowledge of a deposit made by the City of New Orleans, of $40,000, in that bank?

A. I have.

Q. When was the deposit made?

A. I think the 15th October, 1882.

Q. Have you any money to the credit of the City of New Orleans at present in that bank, or had you at the time the interrogatories were served?

A. I have, and had at all times.

Q. How much?

A. I had a balance larger than $40,000 to her credit from day to day, but always $40,000.

Q. How does that deposit stand in your bank?

A. I have not the bank-books here, and cannot say. The deposit beyond this $40,000 is very trifling, no taxes coming in for this year.

Q. How does this deposit of $40,000 stand?

A. To the credit of the city with the strict understanding that it is to remain there to abide the result of the suit of the syndicate of the bonded debt and the Louisville and Nashville R. R. Co.

Q. Is it a special deposit?

210 A. We have but one entry in the general account of the city. We have but one account, but that of $40,000 was specially placed there subject to the restrictions I have mentioned, well known to the officers and tellers of the bank.

Q. Is the $40,000 in any special package or susceptible of identification?

A. No, sir; it is only the bank's credit makes it good.

Q. With whom was the agreement made that you refer to?

A. That I cannot tell you of my own personal knowledge; I cannot state that, for I was not here, but when I came here and discovered these things I inquired and got the information from the cashier and paying teller.

Q. Was the agreement in writing?

A. Not to my knowledge, but the money has always been kept there, the $40,000.

Q. It is in the fund against which the city can check?

A. It cannot check against that; it would be thrown out if it did. That $40,000 is to remain there, and it is thoroughly understood so by the paying teller.

Q. By whom are checks drawn against the fund in your bank?

211 A. The checks for city disbursements are drawn by the city treasurer, Mr. Walshe.

Q. Were you in the City of New Orleans when that deposit was made?

A. I stated I was not. I stated before I was not in the city when this deposit was made. It was by looking over the account that this information came to me, and from the cashier and paying teller.

Q. Nobody can draw the money of the city except Mr. Walshe?

A. No, sir; none but his check.

Q. Would you pay that money out to anybody except upon the check of the City of New Orleans?

A. Not a dollar.

Q. By Mr. MILLER: Would you pay it out at all?

A. I would not pay it out at all until the case is settled, because I am prosecuting that case myself; that is, the case in the Supreme Court.

Q. By the COURT: With whom was that agreement made that you were to hold this money?

A. With the officers of the bank in my absence.

212 Q. Made by the bank, but with whom on the other side?

A. I understood by Mr. Walshe, representing the city.

Bill of Exception on Motion to Quash Execution. Filed June 19th, 1883.

United States Circuit Court, Fifth Circuit & Eastern Dist. of La.

MYRA C. GAINES
vs.
THE CITY OF NEW ORLEANS. } No. 8825.

On motion to quash execution, etc.

Be it remembered, to wit, on the 18th day of June, 1883, of the April term of said court of 1883, this cause was called for trial on the motion to quash execution and seizure filed by the defendant. Defendant, through her counsel, as in said motion of record herein and referred to prayed, asked leave, before going to trial, that the board of liquidation of city debt and the Louisville & Nashville R. R. Co. be made parties to said motion, and should be notified to appear and plead thereto as being necessary parties to the de-

213 termination of the question of the seizability of the fund of forty thousand dollars, as in said motion more fully appears.

Whereupon all parties then of record, to wit, Myra C. Gaines, plaintiff, the City of New Orleans, defendant, (plaintiff in motion to quash), the Louisiana National Bank, and B. T. Walshe, treasurer, being ready and present in court for the purpose of trial of said motion and the traverse to the answers of garnishees, and all announcing themselves ready for trial, subject to the request and right of mover to have said board of liquidation and L. & N. R. R. notified and made parties:

Whereupon the court ruled that said board of liquidation and the Louisville and Nashville R. R. Co. were not parties when the defendant had a right to ask to have brought in as parties hereto,

and that the City of New Orleans, defendant, in execution had no right to make them such, by notice and service of the rule, and ordered the cause to proceed to trial.

214 To which ruling the counsel for the City of New Orleans did then and there submit this as their bill of exceptions, and prays that same be signed and made of record, and it is done accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Continuation of Bill of Exceptions in Case 10316.

Further, the writs of execution and the returns of the marshal thereon issued and returned in the following numbered causes of the docket of this circuit court, viz: Nos. 10213, 8535, 10193, 10183, 9697, 9731, 10009, 9933, 10149, 10081, 10082, 9899, 10041, 10042, 9774, 9666, 9813, 9790, 9768, 9544, 9506, 9351, & 9444.

Writ of *fieri facias* in the case of James H. Young *vs.* City of New Orleans, No. 10213 of the docket of this court, referred to and made part of the foregoing bill of exceptions.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Circuit, holding Sessions in and for the Eastern District of Louisiana.

215 The President of the United States to the marshal of the eastern district of Louisiana or his lawful deputy, Greeting:

You are hereby commanded that you demand from the City of New Orleans the sum of seventeen hundred and eighty dollars, with five per cent. interest on the amounts and from the dates set forth in the judgment until paid and costs—clerk's cost, $12.35; att'y's fee, $10—cash which James H. Young, lately recovered by judgment of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, and if the same be not paid on demand that you cause the same to be made out of the personal estate of the said City of New Orleans in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district that then you cause the same to be made out of the real estate of the said City of New Orleans,

216 and that you have those moneys before our said court to render to the said James H. Young for the judgment aforesaid on the 70th day from the date hereof, together with this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of May, A. D. 1883, and 107th year of the Independence of the United States.

(Signed) T. V. COUPLAND,
Dy Clerk.

Marshal's Return.

Received, New Orleans, March 12th, 1883, and on the 14th day of the same month and year I did demand of the Hon. W. J. Behan, mayor of the city of New Orleans, the satisfaction of this writ, where-

upon said mayor answered that the City of New Orleans had neither money nor property to satisfy this writ in whole or in part. The plaintiff's attorneys could not find or point out any property belonging to the City of New Orleans subject to seizure under this writ. I return the same. No property found.

May 14th, 1881.

217 (Signed) J. R. G. PITKIN,
U. S. Marshal, E. D. of La.,
By E. S. WURZBURGER,
Dy Marshal.

And made a part of this bill of exceptions, and that no other and furthur evidence was offered in this cause on the trial thereof, and to which to the admission of each and every one of said papers, documens, executions, records, and returns the said respondent then and there by its counsel did except as well to the admission of the said evidence as to the ruling of the court refusing a trial by jury; and that said cause was heard, tried, and submitted for a judgment of the court upon the said pleadings, motions, orders, returns, and evidence, and no other; and said respondents then and there did submit this as their bill of exception, and prayed that the same be filed and made a part of the record herein, and it is done accordingly.

June 14th, 1883.

(Signed) EDWARD C. BILLINGS, *Judge.*

218 *Opinion. Filed June 18th*, 1883.

Circuit Court of the United States, Eastern District of Louisiana.

THE UNITED STATES *ex relatione* MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS. } No. 10316.

EDWARD C. BILLINGS, *Judge:*

This cause is submitted upon an application for a mandamus to compel the levy of a tax to pay a judgment rendered in this court.

There are two preliminary objections.

1st. That there has been issued no alternative writ of mandamus. The answer to this objection is that the proceedings in this cause, namely, the petition which, together with an order to show cause, has been served upon the persons against whom the writ is sought, are such as have been invariably followed in this court in the hundreds of causes where similar writs have been allowed and constitute precisely the mode of procedure pointed out by the code
219 of practice; that an alternative writ is not a prerequisite for this process. (See Commissioners *vs.* Aspinwall, 24 Howard, 385.)

2dly. That no return of *nulla bona* upon the writ of *fieri facias* has been made. The mandamus is asked for the amount of the judgment, less $40,000, the amount covered by a seizure under the writ of execution. The return of no property would be only very strong

evidence that the mandamus was necessary for the recovery or collection of the judgment. The proof is that the mayor, when demand was made to point out the property, stated to the marshal that the defendant had none wherewith to satisfy the writ, neither wholly nor in part; that numerous similar writs have within the past few months and within a few days been issued against the defendant and returned unsatisfied; and in the return the ground is set up that there are judgments against the defendant prior to the relators and wholly unsatisfied, amounting to $700,000.00 or thereabouts.

220 No return in this case could more fully establish than does this evidence that the relator must have the levy of a tax to pay her judgment or that it will remain unpaid. The evidence shows, and, indeed, the return of the defendant admits this, and pleads a statute which would dispense with a *fieri facias* under such proofs, and with such a return the return of the execution is immaterial. Extraordinary Remedies, §§ 377.

The real question then comes to be considered, has the relator shown herself to be entitled to a tax? This means, has the law-making power authorized and bound the City of New Orleans to assess and levy and collect a tax to pay relator's judgment?

The relator's demand which is represented by this judgment is for taking possession of her land and preventing her recovery of it from the year 1837 to the year 1877. The various charters of the City of New Orleans show that prior to and since the year 1836 the

221 city has had "all such rights, powers, and capacities as are usually incident to municipal corporations," and also the capacity of acquiring, enjoying, and alienating all kinds of property, real, personal, and mixed."

Acts of 1805, p. 46, sec. 1, and p. 56, sec. 6.
Acts of 1836, p. 31, sec. 4.
Acts of 1852, p. 48, sec. 22.
Acts of 1866, p. 136, sec. 1; and
Acts of 1870, p. 30, sec. 1.

The record shows that the debt or obligation merged in the judgment sprang out of the acquisition, enjoyment, and alienation of real property, and was therefore incurred in the exercise of the powers specially granted. This is conclusively settled by the judgment itself in this case, as well as by that in the case of Gaines *vs.* New Orleans, 6 Wallace, 716, and 15 Wallace, 624.

In Rabassa *vs.* Orleans Navigation Company, 5 L., 463 and 464, the court state the question submitted to be whether a corporation is responsible for an injurious act in relation to a matter within the

222 scope of its corporate objects. They answer the question in the affirmative and say: "If they (the corporation) rented a house and committed waste during the lease, or made themselves responsible by the non-performance of any obligation which the law imposes on the lessee, it can hardly be questioned that they would be bound to make good the loss. If it be objected that in the case last put the responsibility grew out of a contract, we can hardly see how their liability would be raised, if without a contract they

entered upon the property of another and used it for corporate purposes."

Since the corporation by the authority of the statute contracted the liability, in the absence of any other provision of the law for payment, she necessarily had power to bind herself, and did bind herself, to pay by the exercise of those powers incident to municipal corporations, with which she was also endowed by the statute, *i. e.*, by leving a tax. This reasoning is adopted and this conclusion is maintained by the Supreme Court of the United States with
223 reference to a debt evidenced by a board, but the conclusion is just as unavoidable with respect to all debts which originate in the exercise of granted powers.

The facts which beyond doubt authorize the conclusion that the power to tax exists are these: That the obligation is contracted or springs up inside of the granted powers; that there is no other mode of performance; that the power to tax is one of the usual powers incident to cities, and is therefore granted and the conclusion is established with equal certainty, whether the obligation be written or verbal, express or implied, resulting from a contract or tort, provided the act creating the obligation is within the delegated corporate faculties.

In the language of the Supreme Court in Robinson *vs.* Orleans Navigation Co., *supra*, "we cannot see how the liability would be valid if, without a contract that (the corporation) entered upon the property of another and used it for corporate purposes."

The Supreme Court of the United States in United States
224 *vs.* New Orleans, 98 U. S., p. 393, say: "When such a corporation is created the power of taxation is vested in it for all purposes of its existence, unless its exercise be in express terms prohibited."

Again at p. 397, the court say: "As already said the power of taxation is a power incident to such a corporation and may be exercised for all the purposes authorized by its charter or subsequent legislation."

I think it is established beyond successful controversy that the City of New Orleans has the power and may be compelled to levy this tax, unless it is urged by the defendant the power of taxation with reference to this indebtedness is qualified and controlled by the statute of 1856, and by article 209 of the constitution of 1839.

The act of 1856, No. 93, p. 68, provides that "the power to tax is limited to one and one-half per cent. of the assessed value of real estate and slaves; provided that such an amount shall be raised thereby as shall be sufficient to pay the interest of the present
225 city debts, together with the gradual reduction of the capital of the consolidated debt as required by the laws now in force."

The article 209 of our present constitution is as follows: "And no parish or municipal tax for all purposes whatsoever shall exceed ten mills on the dollar of valuation," provided that by a vote of the inhabitants further taxation for certain improvements.

It is to be observed that if this statute and constitutional provis-

ion affect this obligation it cannot be denied that they would practically take away all remedy for the relator.

I shall, in this connection, and for the purpose of testing the argument urged by the defendant, assume what I think is not the fact—that the act of 1856 and article 209, above set forth, were intended to affect pre-existing obligations. If they were such limitations they would be utterly void as impairing a contract entered into on the part of the State of Louisiana itself.

226 There are three provisions of the statute, found in three articles of our civil code, each having been adopted many years prior to 1836, which require to be considered collectively in order to see just what the State has done and has obligated itself to do.

(1.) Civil code, art. 2315 (old 2294): "Every act whatever of man that causes damage to another *obliges* him through whose fault it happened to repair it."

The meaning of this [is] that, under our law, the wrong done by one human being to another, or to his estate, creates an obligation, *i. e.*, brings at once into existence the relation of debtor and creditor between the wrongdoer and the injured party. This provision includes municipal corporations as among those who are subjected to this obligation. McGray *vs.* City of Lafayette, 6 Robt., 668; same case, 4 Ann, 440; Rabassa *vs.* Navigation Co., 5 L., 463 and 464; Wilde *vs.* City of New Orleans, 12 Ann, 15; and Gaines *vs.* New Orleans, 6 Wall., 716.

227 (2.) Civil code, art. 3183 (old 3150): "The property of the debtor is the common pledge of his creditors." The preceding article subjects to the common pledge all the debtor's present and future property. The meaning of this is that the property of the debtor is pledged so that it may be subjected to that process of the creditor which may be suitable to the case; the property of an individual debtor may be recovered by seizure under a writ of *fieri facias;* the property of a debtor who is a municipal corporation may be reached by taxation.

(3.) Civil code, article 8: "A law can prescribe only for the future. It can have no retrospective operation." This article has the paramount force of a constitutional provision. It is a regulation of the power of all lands, whether they be found in future constitutions or future statutes. It is a statutory declaration and covenant on the part of the State incapacitating subsequent laws from disturbing any obligations. Having been in operation from 1808 to the present time it attached to all obligations in this case as they

228 sprang into existence, and controls and protects them.

When these three provisions are put together, it results that the State placed the wrongdoer under an obligation, for its fulfillment subjected all his present and future property to a pledge, and contracted that the law-making power should pass no law which should affect that obligation or that pledge.

It is of avail, then, to urge that the indebtedness of the defendant springs out of a wrong, for, under the statutory enactments above recited, the obligation to repair one injury inflicted by a tort is made

to differ from that existing under the laws of any other State. It is immediately clothed with the properties of an indebtedness, and made the basis of a pledge, indestructible upon present and future acquired property.

Nor does it avail to urge that the relator for all these years had but a chose in action, a litigious right, and that the limita-
229 tion affected the remedy alone. Hers was a right of action inhering in an obligation created by the statute, which, through the form of a remedy, was secured by a pledge of the debtor's entire property through taxation, under a covenant on the part of the State that it should not be lessened nor impaired by future legislation. The subsequent legislation, if applicable and valid, would utterly destroy this created and guaranteed right, for it would take away all possible remedy.

"A right," say our supreme court, in Sabatier *vs.* Creditors, 7 N. S., p. 590, "without a legal remedy, ceases to be a legal right;" and, again, at p. 591, the court say: "On the implied obligation of the property being liable for the engagements of the debtor the Legislature cannot deprive the creditor of recourse on it." In Commissioners *vs.* Bean, 3 Rob., 415, the court say: "The legislature cannot constitutionally, by any act subsequent to the creation of the debt, interfere to change or disturb the relation between debtor and creditor."

It is the express contract on the part of the State, which
230 has been violated, if these limitations are set up between the creditor and his remedy, to the effect that there should be a pledge of the present and future property of the defendant, and that no future law should disturb that pledge. In a case certainly no stronger, the Supreme Court of the United States say, "the State and the corporation are in such cases equally bound." Van Hoffman *vs.* Quincy, 4 Wallace, 455.

This is in substance the question which was determined in Green *vs.* Biddle, 8 Wheaton, 1. There, a compact entered into by the State of Kentucky, and incorporated into its constitution, had declared that all private rights and interests in lands within a district should be determined by the laws existing in Virginia at the date of the cession of that district. A subsequent act of the legislature of Kentucky sought to relieve the occupants of land within the ceded district from damages for its wrongful detention before action brought. This act, though affecting only the remedy, and that in case of torts since the continuance of that remedy had been promised by the State, was held to be void.

231 This case is conclusive upon the relators. In this case there had been an undertaking on the part of the State, the laws existing at a certain time should regulate the recovery for mesne profits; in the relator's case there had been an undertaking on the part of the State that the laws in force when the right to recover originated should not be changed. In this case the undertaking was sought to be disregarded by a withdrawal of the right to recover in the relator's case by a withholding by limitation the

guaranteed remedy for the right. Both these cases unprotected. Wolf *vs.* New Orleans, 103 U. S., 367.

It follows, then, that at whatever time the obligation of the defendant to the relator was incurred at that time there was, by operation of the statute, an inviolable pledge created, which should operate as well upon the future as upon the present, and should give her payment by taxation. When was this obligation incurred?

The defendant had in bad faith gone into possession of re-
232 lator's land, had sold the same and conveyed it, with warranty, and by various decrees kept the relator from recovery [of] possession for a period of 41 years and until the year 1877. The obligation of the defendants since the city was vendor and warrantor and constructive possessor, all in bad faith, was to restore to her vendee the price and acquit the vendee; that is, restore, for the vendee, the fruits to the owner, the relator. The obligation to restore the fruits originated at the same time with the obligation to restore the thing out of which the fruits issued, the land—*i. e.*, at the time of the sale and warranty, in 1836. The condition upon which the obligation could be enforced—*i. e.*, the recovery of possession, did not take place till 1877. C. C. articles, 502. Our jurisprudence is settled that in conditional obligations the law which exists at the time the obligation was constructed and not that which exists when the condition takes place governs the rights of the parties. Hunt *vs.* Boyd, 2 L., 112. The measure, therefore, of relator's right to a tax must be determined by the law in force in 1836, and at
233 that time there was no limit, neither in the constitution nor the statute. At that time whatever debts the corporation incurred, whether by contract or by tort, she could be compelled to levy a tax to pay.

I have thus far considered the question upon the hypothesis that the act of 1856 and the article 209 of the present constitution were inte-ded to apply to antecedent indebtedness. But, in my opinion, it is manifest that this statute and this article had no reference to already existing obligations of any sort. The terms of the act of 1856 show that the limitation was to be operative only, provided the tax thus afforded should be sufficient to pay the interest and the maturing principal. The care taken to make provision for all outstanding obligations is manifest.

The portion of the act of 1876, which withdraws the power of taxation, has been declared void, so far as concerns antecedent contract obligations. This would, for the same reason, be true with regard to antecedent obligations not contract in their origin,
234 but protected by a statutory contract which attached to them at their inception and adhered to them ever afterward.

The article 209 of our constitution was designed and ordained as a limit upon the expenditures of the parishes and cities, as a rule of rigid economy in the administration of their affairs.

To that extent it may be invoked. It has no force save application to obligations already completely incurred

Those who contend that it was intended to work a rejection or, what is the same, an indefinite paralysis of pre-existing obligations,

must treat the provision as really stating that in order to secure moderate taxation all outstanding obligations are to be set aside and disregarded. The statement of such a construction should be its refutation.

The supreme court of this State have refused to observe this as a limit so far as concerns indebtedness antecedently incurred springing from contracts. This case cannot in principle be distin-
235 guished from that. Under our law an obligation, the *vinculum juris*, which in case of torts in the other States creates a definite hold upon the property of the debtor only, after judgment and process issued, is made to attach to the property of the debtor by as indissoluble a tie from the moment of the commission of the act which is its sourse in case of an act of wrong as of an act of contract. In this State, when one takes or detains another's property the State has promised the same compensation and has connected that promise by a direct and present tie with the estate of the author of the act as irrevocably as when one makes and delivers a promissory note.

If, therefore, as all concede the obligation springing from a pre-existing contract does not fall within or is not controlled by this constitutional limitation for the reason that it cannot be impaired, it must follow that under our law, so far as concerns the resort to the property of the obligor, the antecedent obligation spring-
236 ing from a wrongful act is equally excluded for the reason that the resort is by a statute, which entered into the obligation, secured, and future withdrawal or modification is by another statute, also forming a part of the obligation, guaranteed against.

This, and much more than this, is recognized and enforced by our present constitution. Its provisions specifically deal with the redress for wrongs, and, to the honor and credit of the State be it said, in case of damages arising from wrongs it has torn aside and destroyed all exemptions and limitations which could be held to operate upon the right to resort to the property of the wrongdoer. Article 11 provides that "all courts shall be open, and every person for injury done him in his rights, lands, goods, person, or reputation, shall have adequate remedy by due process of law and justice administered without denial or unreasonable delay."

I understand this provision to be applicable to the redress for all wrongs done to person or property, and to that extent to give
237 to the redress for wrongs a coequal, if not a permanent, security to that guaranteed to the enforcement of contracts.

I understand this provision to ordain in behalf of those who, like the relator, are seeking reparation for injury done to themselves or their estate, not only that the courts shall be always open, not only that the suitors shall have a speedy and just trial, not only that there shall be awarded due process, but in addition to all there is solemnly ordained and guaranteed a remedy entirely adequate. This remedy is distinct from due process, for it is to be by due process. The words "adequate remedy," means complete satisfaction of the judgment without restriction. The process will vary with the nature of the recovery and the character of the debtor. If the judgment de-

crees the recovery of money and the debtor be a natural person *it* would be a writ of *fieri facias*. If the debtor be a municipal corporation the process would be a writ of mandamus compelling the levy of a tax; for it is settled that the process for compel-
238 ing satisfactions of a money judgment against a municipal corporation is a *fieri facias* or a mandamus for a tax; both are declared to be process in execution. Riggs *vs.* Johnson County, 6 Wallace, 198, and Memphis *vs.* Brown, U. S. R., 300.

The conclusion is that the relator has a right to the tax prayed for; that she acquired this right before there was any limitation upon the power of the city to tax, except that springing from its purposes and capacities as a corporation; that if the statute of 1856 and article 209 of the constitution are intended to include this case they would be void as impairing an obligation of a contract, the State having contracted that the relator's right should be unaffected by subsequent laws.

That these limitations were not intended to apply to pre-existing obligations, when the right of a creditor through a tort ora contract upon the property of the debtor was fixed by an irreparable law; that these limitations were established with as complete an
239 absence of purpose as there was of power to cast off or repudiate antecedent indebtedness, but were ordained as wholesome checks upon future expenditures and the creation of subsequent debts.

That, with reference to that class of indebtedness to which belongs the one upon which the relator recovered her judgment, the present constitution of the State not only imposes no restriction upon the right to satisfaction by the levy of a tax, but, on the contrary, has placed that right beyond the reach of legislative action, and by its own force has given due process and complete remedy; that in this case that process is a mandamus and that remedy is the assessment and levy and collection of a tax.

The case of Wolf *vs.* New Orleans, 103 U. S. R., p. 338, was in principle like this case. There, as here, the judgment had been registered and no provision made for its payment in the annual budget, and the Supreme Court, after dealing with all the questions
240 involved in the acts of 1870 and 1876 in that mandate, prescribe the forms and terms of the writ and the time of the levy of the tax.

That mandate will be followed in this case.

So far *is* this proceeding is concerned the defendant must be credited with the amount under seizure under the *fieri facias*, namely, the sum of $40,000.

For the balance of the judgment, with interest, the relator is entitled to a writ of mandamus as prayed for.

Decree. Entered and Filed June 19, 1883.

Circuit Court of the United States for the 5th Circuit & Eastern District of Louisiana. In Equity.

UNITED STATES *ex rel.* MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS. } No. 10316.

This cause having been submitted upon the petition for mandamus, motion to quash answer and evidence, and the same
241 having been duly considered by the court for the reasons assigned in the written opinion heretofore filed in the cause:

It is ordered, adjudged, and decreed that the motion to quash, filed by the defendant herein, be, and the same is hereby, disallowed and overruled, and that the relator has established her right to the writ of mandamus against the City of New Orleans, the council thereof, and each and every member of the same, and each and every officer of said city whose duties relate to the assessment or collection of taxes and is entitled to the same, and that said writ issue as follows, viz:

That the City of New Orleans, the council thereof, and each and every member of the same, and each and every officer of said city whose duties relate to the assessment or collection of taxes are hereby commanded, directed, and required promptly to assemble in council and pass an ordinance or resolution levying a special tax upon all the real and personal property lying or being within the corporate limits of the City of New Orleans liable to taxation
242 for the purpose of paying relator's judgment recovered by her in this court the 5th day of May, A. D. 1883, in the suit entitled Myra Clark Gaines *vs.* The City of New Orleans, No. 8825 of the docket, for the sum of one million nine hundred and twenty-five thousand six hundred and sixty-seven & $\frac{83}{100}$ dollars (1,925,667.83), with interest at and after the rate of five (5) per centum per annum upon the sum of nine hundred and fifty thousand one hundred and ten dollars ($950,110) from the 10th day of January, A. D. 1881, until paid, and in the further sum of thirty-four thousand dollars ($34,000), the amount of costs heretofore taxed against the several defendants in suits of Myra C. Gaines *vs.* P. H. Monsseaux *et als.*, numbered 3663, and Myra C. Gaines *vs.* P. F. Agnelly *et al.*, numbered 6085 upon the docket of this court, with interest at the rate of five (5) per centum per annum till paid, from January 10th, A. D. 1881, less the sum of forty thousand dollars ($40,000), the amount of the seizure by garnishment under the writ of *fieri*
243 *facias* issued in said suit of Myra Clark Gaines *vs.* The City of New Orleans, No. 8825 of the docket of this court, to be credited on said judgment rendered therein as of the 29th day of May, A. D. 1883, with costs and expenses of this suit, providing in such ordinance for the collection of such tax in a prompt and expeditious manner, and therein fully securing the immediate application of such special tax to the object and purpose for which such tax may have been levied and collected.

That when assembled in council as aforesaid, in addition to the ordinance or resolution levying a special tax, and providing for its collection and payment as aforesaid by another ordinance or resolution to be passed or adopted for that purpose, to amend the municipal budget, at that time existing, and thereafter to frame and adopt each and every estimate of receipts and expenditures which from and after that time shall be made by the city; and the said City of New Orleans, the council thereof, and each and every member of
244 the same, and each and every officer of said city whose duties relate to the assessment or collection of taxes in council assembled or otherwise, so as to include and place upon such amended and further and other budget of estimate of receipts and expenditures the judgment held and owned by the relator as aforesaid, or the unpaid portion of judgment, or the amount remaining unpaid or due thereupon, may stand and be regarded as a judgment, liability, and expenditure of the said City of New Orleans until the amount of such judgment or the sum remaining unpaid thereon shall have become fully paid and extinguished, then and there to levy and impose "a budget tax," under and by virtue of the estimate of receipts and expenditures hereinabove referred to, upon all the real and personal property hereinbefore designated, and upon any and all property contemplated by such budget or estimate to be levied and assessed in a way and manner and to an amount sufficient to pay off and discharge whatever sum may then be due and owing upon
245 relator's aforesaid judgment at the time of adopting such budget and levying and imposing a budget tax, as hereinbefore demanded, to provide for the collection of and to collect such budget tax, without unreasonable delay, and with the monies or tax thus collected to pay and satisfy as promptly as the nature of the case will admit of, and without laches or negligence, the entire amount which at the time may remain due and owing to relator under the aforesaid judgment against the City of New Orleans.

And the said City of New Orleans, the council thereof, and each and every member of the same, and each and every officer of said city, whose duties relate to the assessment or collection of taxes, separately and collectively, and without further delay, are required and commanded to do and perform each and every one and all acts and things necessary for the payment of relator's said judgment, together with all costs in suits numbered 8825 and 10316 of the docket of this court.

246 And that the said City of New Orleans, the council thereof, and each and every member of the same, and each and every officer of said city whose duties relate to the assessment or collection of taxes, and their successors in office, make due return to said court from time to time of all their acts and doings herein.

June 19th, 1883.

(Signed) EDWARD C. BILLINGS, *Judge.*

Writ of Mandamus to the City of New Orleans. Issued June 21st, 1883.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and Eastern District of Louisiana.

UNITED STATES ON RELATION OF MYRA CLARK GAINES *vs.* CITY OF NEW ORLEANS *et al.* } No. 10316.

The President of the United States to the City of New Orleans, the council thereof, and each and every member of the same, and to each and every officer of said city whose duties relate to
247 the assessment or collection of taxes, Greeting:

You, and each of you, are hereby commanded, directed, and required promptly to assemble in council and pass an ordinance or resolution levying a special tax upon all the real and personal property lying or being within the corporate limits of the City of New Orleans liable to taxation for the purpose of paying relator's judgment recovered by her in this honorable court on the fifth day of May, 1883, in the suit entitled Myra Clark Gaines *vs.* The City of New Orleans, No. 8825 of the docket, for the sum of one million nine hundred and twenty-five thousand six hundred and sixty-seven $\frac{83}{100}$ dollars ($1,925,667.83), with interest at and after the rate of five per centum per annum upon the sum of nine hundred and fifty thousand *thousand* one hundred and ten dollars ($950,110.00) from the tenth day of January, A. D. 1881, until paid, and in the further sum of thirty-four thousand dollars ($34,000.00), the amount of costs heretofore taxed against the several defendants in suits of
248 Myra C. Gaines *vs.* P. H. Monsseaux *et al.*, numbered 3663, and Myra C. Gaines *vs.* P. F. Agnelly *et al.*, numbered 6085 upon the docket of this court, with interest at the rate of five per centum per annum till paid from January 10th, A. D. 1881, less the sum of forty thousand dollars ($40,000.00), the amount of the seizure by garnishment under the writ of *fieri facias* issued in said suit of Myra Clark Gaines *vs.* The City of New Orleans, No. 8825 of the docket of this court, to be credited on said judgment rendered therein as of the 29th day of May, A. D. 1883, with costs and expenses of this suit, providing in such ordinance for the collection of such tax in a prompt and expeditious manner, and therein fully securing the immediate application of such special tax to the object and purpose for which such tax may have been levied and collected.

That when assembled in council as aforesaid, in addition to the ordinance or resolution levying a special tax, and providing for its collection and payment as aforesaid by another ordinance or resolution to be passed or adopted for that purpose, to amend the
249 municipal budget at that time existing, and thereafter to frame and adopt each and every estimate of receipts and expenditures, which, from and after that time, shall be made by the city; and the said City of New Orleans, the council thereof, and each and every member of the same, and each and every officer of

said city whose duties relate to the assessment or collection of taxes, in council assembled, or otherwise, so as to include and place upon such amended and further and other budget of estimates of receipts and expenditures, the judgment held and owned by relator, as aforesaid, or the unpaid portion of judgment, in order that said judgment, or the amount remaining unpaid or due thereupon, may stand and be regarded as a judgment, liability, and expenditure of the said City of New Orleans until the amount of such judgment, or the sum remaining unpaid thereon, shall have become fully paid and extinguished, then and there to levy and impose "a budget tax," under and by virtue of the estimate of receipts and expendi-
250 tures, hereinabove referred to, upon all the real and personal property hereinbefore designated, and upon any and all property contemplated by such budget or estimate, to be levied and assessed in a way and manner, and to an amount sufficient to pay off and discharge whatever sum may then be due and owing upon relator's aforesaid judgment at the time of adopting such budget, and levying and imposing a budget tax, as hereinbefore demanded, to provide for the collection of, and to collect, such budget tax without unreasonable delay, and with the moneys or tax thus collected to pay and satisfy, as promptly as the nature of the case will admit of, and without laches or negligence, the entire amount which at the time may remain due and owing to relator under the aforesaid judgment against the City of New Orleans.

And you, the said City of New Orleans, the council thereof, and each and every member of the same, and each and every officer of said city whose duties relate to the assessment or collection of taxes, separately and collectively, and without further delay, are
251 required and commanded to do and perform each and every one and all acts and things necessary for the payment of relator's said judgment, together with all costs in suits numbered 8825 and 10316 of the docket of this court.

Clerk's costs	$127
Marshal's "	148
Attorney's fee	40

And that you, the said City of New Orleans, the council thereof, and each and every member of the same, and each and every officer of said city whose duties relate to the assessment or collection of taxes, and your successors in office, make due return to said court, from time to time, of all your acts and doings herein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 21st day of June, A. D. 1883.

[SEAL.] (Signed) T. N. COUPLAND,
Dy Clerk.

Marshal's Return.

Received June 21st, 1883, by the U. S. marshal, and I served
252 true copies of the within writ of mandamus on the City of New Orleans, defendant herein, through the mayor, comptroller, city treasurer, and members of the city council thereof, in the following date and manner, to wit:

On William J. Behan, mayor City of New Orleans, personally, June 21, 1883.

On J. V. Guillotte, comptroller City of New Orleans, personally, June 22, 1883.

On B. T. Walsh, treasurer City of New Orleans, personally, June 21, 1883.

On Edward Booth, member of city council, personally, June 21, 1883.

On M. D. Lagan, member of city council, personally, June 21, 1883.
" Wm. Conway, " " " 21, "
" H. McMains, " " " 21, "
" W. J. Grady, " " " 21, "
" C. A. Butler, " " " 21, "
" R. H. Benners, " " " 21, "
" A. L. Burthe, " " " 21, "
" T. H. Ryan, " " " 21, "
" A. D. Saucier, " " " 21, "
" J. N. Hardy, " " " 21, "
", Joseph Lusk, " " " 21, "
" Francis Lauer, " " " 21, "
" Z. J. Dowty, " " " 21, "
" Wm. Graner, " " " 21, "
" Peter Kaiser, " " " 21, "
" W. J. McGeehan, " " " 21, "
" Nicholas Amann, " " " 21, "
" Otto Thoman, " " " 21, "
" Leonard Naef, " " " 21, "
On H. C. Miller, " " " 22, "

253 On H. L. Franz, member of city council, personally, June 22, 1883.

On H. Albert, member of city council, personally, June 22, 1883.
" C. Hewchert, " " " 22, "
" A. J. Fitzpatrick, " " " 22, "
" P. J. Reiley, " " " 22, "
" B. O. L. Rayne, " " " 29, "
" A. J. Michaelis, " " " 26, "
" A. Patomo, " not served; absent from the city.

(Signed) J. R. G. PITKIN,
U. S. Marshal Eastern Dist. of La.
By E. S. CURRY,
D'y Marshal.

Motion and Order for Appeal.

Extract from the Minutes of June 26th, 1883.

U. S. *ex rel.* MYRA C. GAINES
vs.
CITY OF NEW ORLEANS. } No. 10316.

On motion of Charles F. Buck, J. R. Beckwith, and Henry C. Miller, of counsel for the City of New Orleans, defendant herein, and on

suggesting that said defendant is aggrieved by the final judgment herein rendered on the 19th June, 1883, in favor of the re-
254 lator and against the defendant, directing the levy of the tax claimed in relator's petition, that the defendant designs to prosecute an appeal to reverse said judgment.

It is ordered that said appeal to operate as a supersedeas and stay execution of said judgment be allowed to the City of New Orleans, returnable to the Supreme Court of the United States on the 2d Monday of October, A. D. 1883, upon the defendant furnishing bond, with good and sufficient security, in the sum of fifty thousand dollars, conditioned as the law directs, provided the defendant file its stipulation in this cause that it will furnish any additional bond upon the appeal herein which the Supreme Court of the United States may, upon the application of the complainant, require.

And the court ordered that the opinion it delivered at the time of granting this appeal, and the alternative order allowing the appeal be filed of record in the cause.

255 *Motion and Order for Writ of Error.*

Extract from the Minutes of June 26th, 1883.

U. S. *ex rel.* MYRA C. GAINES
vs.
CITY OF NEW ORLEANS. } No. 10316.

On motion of Charles F. Buck, J. R. Beckwith, and Henry C. Miller, of counsel for the City of New Orleans, defendant herein, and on suggesting that said defendant is aggrieved by the final judgment herein rendered on the 19th June, 1883, in favor of the relator and against the defendant directing the levy of the tax claimed in relator's petition, that the relator designs to prosecute a writ of error to reverse said judgment.

It is now ordered that said writ of error, to operate as a supersedeas and stay execution of said judgment, be allowed to the City of New Orleans, returnable to the Supreme Court of the United States on the 2d Monday of October, A. D. 1883, upon the defendant furnishing bond with good and sufficient security in
256 the sum of fifty thousand dollars conditioned as the law directs, provided the defendant file its stipulation in this cause that it will furnish any additional bond upon the writ of error herein which the Supreme Court of the United States may, upon the application of the complainant, require.

And the court ordered that the opinion it delivered at the time of granting this appeal, and the alternative order allowing the appeal, be filed of record in this cause.

Opinion on Application to fix Amount of Bond. Filed June 26th, 1883.

U. S. Circuit Court, Eastern District of Louisiana.

UNITED STATES *ex relatione* MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS.

E. C. Billings, judge.

Application to fix the Amount of the Bond upon Appeal.

In case of a proceeding to review a decree for a mandamus
257 which directs the levy of a tax, the tax is treated as property in the possession of the court, and therefore for all that would be included within it no bond need be given.

In such a case the rule (No. 29) of the Supreme Court requires the amount of security to be sufficient for "costs and interest on the appeal and just damages for delay."

In this case the judgment is, in round numbers, for $2,000,000.00, one half of which bears interest and one-half of which does not bear interest. For the interest which is to accrue by the terms of the judgment no bond need be given; for in case the judgment directing the mandamus is confirmed the interest would be included in the tax to be levied, the decree being to levy the amount of the judgment with interest.

But one-half of the judgment being itself for interest, by the terms of the judgment bears no interest. In case of confirmation of the judgment, therefore, the Supreme Court would, as "interest on the appeal and just damages for delay," add interest where none accrues by the terms of the judgment. The average time nec-
258 essary to reach and dispose of a cause on appeal to the Supreme Court is 3½ years. This would make it necessary to require a bond for the interest upon one-half of the judgment, say $1,000,000, at 5 per cent. per annum for 3½ years, which would make $175,000.00 (one hundred and seventy-five thousand dollars). To this should be added $1,000.00 (one thousand dollars) for costs, which may be recovered on the appeal, and making in all $176,000.00 (one hundred and seventy-six thousand dollars), at which last sum the amount of the bond is fixed for a suspensive appeal in the alternative, and subject to what is hereafter paid. Leave is further granted to the defendant to apply to the circuit judge or any associate justice of the Supreme Court who has, by law, authority also to take and fix the amount of this bond, to change the amount of the same if he deems it more than is adequate security; and if he shall fix a less amount, that amount is to be deemed adopted by this
259 order. This may be done at any time within the sixty days allowed by law for giving the bond. In case it is necessary to test the securities at a time when no judge is within the district, the surety may be taken and certified for approval before one of the parties or either judge by J. W. Gurley, Esq., master.

This conclusion was communicated to the counsel for the defendant, when, after hearing and considering the suggestions made by them, the court is of opinion that the rights of the complainant will be protected and the defendant's opportunity for taking the appeal will be facilitated by another provision. Accordingly [to] the foregoing order is added the following paragraph: "Or the amount of the bond may be fixed at the sum of $50,000.00 upon condition that the defendant also file its stipulation in this cause that it will furnish any additional bond upon the appeal herein which the Supreme Court of the United States may, upon the application of the complainant, require."

(Signed) EDWARD C. BILLINGS, *Judge.*

260 *Stipulation. Filed June 29th,* 1883.

United States Circuit Court, Fifth Circuit and Eastern District of La.

U. S. *ex rel.* MYRA C. GAINES
vs.
THE CITY OF NEW ORLEANS. } No. 10316.

Whereas in the above-entitled cause a supersedeas has been allowed on a bond for the sum of fifty thousand dollars, which has been this day approved and filed, both on the writ of error and the appeal; and whereas in the order fixing said amount for bond to operate supersedeas the condition is imposed on the plaintiff in error and appellant that she should file in this cause her stipulation to the effect that in the event complainant, defendant in error, and appellee should move the Supreme Court to increase the amount of said bond, and said Court should order that additional bond be given:

Now, the said City of New Orleans, through undersigned
261 counsel, accepts said conditions; and having given bond in the sum of fifty thousand dollars, as required by the order of this court, hereby stipulates and agrees to furnish such additional bond as the Supreme Court of the United States may require if application for such increase be made; and if such additional bond be not given within the delay that may be allowed for the purpose the supersedeas, or both the writ of error and appeal, shall fall and be vacated.

(Signed) CHAS. F. BUCK,
City Att'y.

Bond for Appeal. Filed June 29th, 1883.

Know all men by these presents that we, The City of New Orleans, as principal in the sum of fifty thousand dollars, and E. Howard McCaleb, E. H. Farrar, Charles F. Buck, W. J. Behan, Robert Jackson, P. O. Fazende, Louis Grunewald, N. D. Wallace, E. B. Kruttschnitt, B. Saloy, John W. Fairfax, Edward Booth, Hugh
262 McManus, Philip J. Reilly, Henry C. Miller, Thomas L. Bayne,

J. R. Beckurth, J. K. Bell, and E. L. Rantett, as sureties, each for the amount set opposite their names, are held and firmly bound unto Myra Clark Gaines, the said City of New Orleans in the sum of fifty thousand ($50,000.00) dollars, the said sureties being bound each only in the amount specified, to wit:

E. H. McCaleb, in the sum of five thousand dollars.
E. H. Farrar, " " " two thousand five hundred dollars.
Chas. F. Buck, " " " two thousand five hundred dollars.
W. J. Behan, " " " five thousand dollars.
Robert Jackson, " " " five thousand dollars.
P. O. Fazende, " " " twenty-five hundred dollars.
Louis Grunewald, " " " two thousand dollars.
N. D. Wallace, " " " twenty-five hundred dollars.
E. B. Kruttschnitt, " " " one thousand dollars.
B. Saloy, " " " two thousand dollars.
J. W. Fairfax, " " " one thousand dollars.
Edward Booth, " " " twenty-five hundred dollars.
Hugh McManus, " " " twenty-five hundred dollars.
P. J. Reilly, " " " twenty-five hundred dollars.
Henry C. Miller, " " " twenty-five hundred dollars.
Thomas L. Bayne, " " " twenty-five hundred dollars.
J. R. Beckurth, " " " twenty-five hundred dollars.
J. K. Bell, " " " two thousand dollars.
E. L. Rantett, " " " two thousand dollars—

263 lawful money of the United States, to be paid to the said Myra Clark Gaines, her heirs, executors, and assigns; for which payment, well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs and administrators, firmly by these presents to the extent for which each binds himself, and no further, as expressed above.

Sealed with our seals, and dated the 29th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas the said City of New Orleans having hertofore, to wit, on the twenty-eighth June, 1883, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 19th June, 1883, by the circuit court of the United States for the fifth circuit holding sessions in and for the district of Louisiana, in the suit of the United States *ex rel.* Myra Clark Gaines *vs.* The City of New Orleans, No. 10316 of the docket thereof:

Now, the condition of this obligation is that if the above-bounden the City of New Orleans shall prosecute its said appeal to
264 effect and shall answer all damages and costs if it shall fail

to make good its plea, then this obligation to be void; otherwise to be in full force and virtue.

(Signed) W. J. BEHAN, *Mayor.*

(Signed) E. HOWARD McCALEB, [L. S.]
for five thousand dollars.
EDGAR H. FARRAR, [L. S.]
for twenty-five hundred dollars.
CHAS. F. BUCK, [L. S.]
for twenty-five hundred dollars.
W. J. BEHAN, [L. S.]
five thousand dollrs.
ROB'T JACKSON, [L. S.]
for five thousand dollars.
P. O. FAZENDE, [L. S.]
twenty-five hundred dollars.
LOUIS GRUNEWALD, [L. S.]
two thousand dollars.
NATH. D. WALLACE, [L. S.]
twenty-five hundred dollars.
E. B. KRUTTSCHNITT, [L. S.]
one thousand dollars.
BERTRAND SALOY, [L. S.]
two thousand dollars.
B. SALOY. [L. S.]
J. W. FAIRFAX, [L. S.]
one thousand dallars.
EDW. BOOTH, [L. S.]
twenty-five hundred dollars.
HUGH McMANUS, [L. S.]
twenty-five hundred dollars.
PHIL. J. REILLY, [L. S.]
twenty-five hundred dollars.
HENRY C. MILLER, [L. S.]
twenty-five hundred dollars.
THOS. L. BAYNE, [L. S.]
twenty-five hundred dollars.
J. R. BECKURTH, [L. S.]
two thousand five hundred dollars.
J. K. BELL, [L. S.]
two thousand dollars.
E. L. RANTETT, [L. S.]
for two thousand dollars.

Bond accepted to operate a supersedeas.

(Signed) DON A. PARDEE, *Judge.*

265 *Bond for Writ of Error. Filed June 29th,* 1883.

Know all men by these presents that we, the City of New Orleans as principal, in the full sum of fifty thousand dollars and the following-named persons, whose names are hereinafter written and who

execute this obligation as sureties for the faithful performance of this obligation to the extent and for the sums written herein with their said names, respectively, that is to say:

E. H. McCaleb, for five thousand dollars;
E. H. Farrar, for two thousand five hundred dollars;
Chas. F. Buck, for two thousand five hundred dollars;
W. J. Behan, for five thousand dollars;
Robert Jackson, for five thousand dollars;
T. O. Fazende, for two thousand five hundred dollars;
Louis Grunewald, for two thousand dollars;
N. D. Wallace, for two thousand five hundred dollars;
E. B. Kruttschmitt, for one thousand dollars;
B. Saloy, for two thousand dollars;
J. W. Fairfax, for one thousand dollars;
Edward Booth, for two thousand five hundred dollars;
Hugh McManus, for two thousand five hundred dollars;
P. J. Reilly, for two thousand five hundred dollars;
Henry C. Miller, for two thousand five hundred dollars;
Thomas L. Bayne, for two thousand five hundred dollars;
J. R. Beckwith, for two thousand five hundred dollars;
266 J. K. Bell, for two thousand dollars;
Ed. Ranlett, for two thousand dollars,

are held and firmly bound unto Myra Clark Gaines, the said City of New Orleans, principal, in the full sum of fifty thousand dollars, and the said sureties each for the said sum hereinbefore named for and by each of said sureties for the faithful performance of this obligation by the said principal, the City of New Orleans, to be paid to the said Myra Clark Gaines, her certain attorney, heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators firmly by these presents in the form, manner, and to the extent set forth above.

Sealed with our seals and dated this 29th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, being a suit for a
267 writ of mandamus, wherein the United States of America on the relation of Myra Clark Gaines is plaintiff, judgment was rendered against the City of New Orleans, defendant in said suit and proceeding; and the said City of New Orleans having obtained a writ error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation to the said Myra Clark Gaines, said relator admonishing her to be and appear at the Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next.

Now, the condition of this obligation is such that if the said City of New Orleans shall prosecute its Writ of Error to effect, and answer all damages and costs, if it fail to make its plea good, then the

above obligation to be void, otherwise to remain in full force and virtue.

(Signed) W. J. BEHAN, *Mayor.*

(Signed) [SEAL.] E. HOWARD McCALEB, [SEAL.]
for five thousand dollars ($5,000).
[SEAL.] EDGAR H. FARRAR, [SEAL.]
for twenty-five hundred dollars.
[SEAL.] CHAS. F. BUCK, [SEAL.]
for twenty-five hundred dollars.
[SEAL.] W. J. BEHAN, [SEAL.]
for five thousand dollars.
[SEAL.] ROBT. JACKSON, [SEAL.]
for five thousand dollars.
268 [SEAL.] P. O. FAZENDE, [SEAL.]
twenty-five hundred dollars.
[SEAL.] LOUIS GRUNEWALD, [SEAL.]
two thousand dollars.
[SEAL.] NATH. P. WALLACE, [SEAL.]
twenty-five hundred dollars.
[SEAL.] E. B. KRUTTSCHMITT, [SEAL.]
one thousand dollars.
[SEAL.] BERTRAND SALOY, [SEAL.]
two thousand dollars.
(Signed) B. SALOY. [SEAL.]
[SEAL.] J. W. FAIRFAX, [SEAL.]
one thousand dollars.
[SEAL.] EDW. BOOTH, [SEAL.]
twenty-five hundred dollars.
[SEAL.] HUGH McMANUS, [SEAL.]
twenty-five hundred dollars.
[SEAL.] PHIL. J. REILLY, [SEAL.]
twenty-five hundred dollars.
[SEAL.] HENRY C. MILLER, [SEAL.]
twenty-five hundred dollars.
[SEAL.] THOS. L. BAYNE, [SEAL.]
twenty-five hundred dollars.
[SEAL.] J. R. BECKWITH, [SEAL.]
twenty-five hundred dollars.
[SEAL.] J. K. BELL, [SEAL.]
two thousand dollars.
[SEAL.] E. L. RANLETT, [SEAL.]
two thousand dollars.

Bond accepted to operate a supersedeas.

(Signed) DON. A. PARDEE, *Judge.*

Stipulation as to Writs of Fi. Fa. and Returns Thereon Referred to in Bill of Exception and Note of Evidence Filed August 31, 1883.

Circuit court of the United States, eastern district of Louisiana.

269 THE UNITED STATES *ex rel.* MYRA CLARK GAINES,
vs.
THE CITY OF NEW ORLEANS. } No. 10316.

It is stipulated by and between the counsel for the respective parties that in order to reduce the bulk of the transcript in this cause the writs of *fi. fa.* named in the relator's note of evidence on the trial of this cause and in the bill of exceptions by the respondents, the writ of *fi. fa.* in No. 10213, with the return of marshal thereon, shall be copied in full in the transcript, and it is agreed that the said writs of *fi. fa.* in cases Nos. 8535, 10193, 10183, 9697, 9731, 10009, 9933, 10149, 10081, 10082, 9899, 10041, 10042, 9774, 9666, 9813, 9790, 9768, 9544, 9506, 9351, and 9444, named in said note of evidence and bill of exceptions, are each and all of them the same in form as the said copy, and that the return of the marshal thereon is also the same, and that the clerk omit from the transcript copies thereof, it being agreed that the same and all of them are in
270 all respects the same as No. 10213, copied, except as to the name of the plaintiff in execution, and that said writs of *fi. fa.* were all issued between the dates November 1st, 1880, and May 12th, 1883.

(Signed) J. R. BECKWITH,
Attorney for City of New Orleans, Respondent.

(Signed) WM. REED MILLS,
Sol'r for Myra C. Gaines, Complainant.

August 31st, 1883.

271 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 270 pages of manuscript and 29 pages of print contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of United States *ex rel.* Myra Clark Gaines *versus* The City of New Orleans, No. 10316 of the docket of the said court.

Witness my hand and the seal of said court, at the City of New Orleans, this 8th day of Sept'r, A. D. 1883. (Eight words and two figures interlined, approved.)

F. A. WOOLFLEY, *Clerk.*

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

I, Edward C. Billings, United States judge for the eastern district Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the City of New Orleans, in said district, this 8th day of Sept'r, A. D. 1883. (Two words interlined, approved.)

EDWARD C. BILLINGS, *Judge.*

272 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Myra Clark Gaines, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a motion and order for an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein The City of New Orleans is appellant and you, the said Myra Clark Gaines, as relator in the suit of the United States of America on the relation of Myra Clark Gaines, No. 10316 of the docket of said court, are appellee, to show cause, if any there be, why the decree rendered against the said City of New Orleans, appellant, as in said motion and order for an appeal mentioned, should not be correct, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 29th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

DON A. PARDEE, *Judge.*

Subscribed and sworn before me June 30, 1883.

F. A. WOOLFLEY,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

273 [Endorsed:] Serve on W. R. Mills, solicitor for appellee. United States circuit court, eastern district of Louisiana. R. No. 10316. City of New Orleans, appellant, *vs.* United States on the relation of Myra Clark Gaines, appellee. Citation to appellee.

Marshal's Return.

Received June 29, 1883, by the U. S. marshal, and on June 30th, 1883, I served a true duplicate of the within citation of appeal on the appellees herein named, to wit, Myra Clark Gaines, appellee, by handing the same to Wm. R. Mills, Esq., in person, in the City of

New Orleans, the solicitor for said appellee, he accepting service in behalf of said appellee.

J. R. G. PITKIN,
U. S. Marshal, Eastern District of La.
By E. S. CURRY,
D'y U. S. Marshal.

Personally appeared before me E. S. Curry, a lawful deputy of J. R. G. Pitkin, U. S. marshal for the eastern district of Louisiana, and makes oath that he served a true duplicate of the within citation of appeal on the appellee herein named as set forth in his official return hereon.

E. S. CURRY,
D'y U. S. Marshal.

274 UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the United States of America on the relation of Myra Clark Gaines, relator, against the City of New Orleans, defendant and respondent, being No. 10316 of the docket of said court, a manifest error hath happened, to the great damage of the said City of New Orleans, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under you seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 21st day of June, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the Eastern District of Louisiana.

275 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 1031. The City of New Orleans, pl'nt'ff in error, *versus* The United States on the relation of Myra Clark Gaines, d'ef't in error. Writ of error. Filed June 21st, 1883. F. A. Woolfley, clerk.

276 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Myra Clark Gaines, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein The City of New Orleans is plaintiff in error, and you, the said Myra Clark Gaines, as relator in the suit of the United States of America on the relation of Myra Clark Gaines *against* The City of New Orleans, No. 10316 of the docket of said court, are defendant in error, to show cause, if any there be, why the judgment rendered against the said City of New Orleans, plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 29th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

DON A. PARDEE, *Judge.*

277 [Endorsed:] Serve on W. R. Mills, att'y for def't in error. United States circuit court, eastern district of Louisiana. R. No. 10316. City of New Orleans, plaintiff in error, *vs.* U. S. *ex rel.* Myra Clark Gaines, defendant in error.

Marshal's Return.

Received June 29, 1883, by the U. S. marshal, and on June 30th, 1883, I served a true duplicate of this the original writ of error on Myra Clark Gaines, def'd't in error herein, by handing the same to Wm. R. Mills, Esq., the attorney for said defendant in error, in person, in the City of New Orleans, the said Wm. R. Mills accepting service in behalf of said defendant in error. Citation to defendant in error.

J. R. G. PITKIN,
U. S. Marshal, Eastern District of La.
By E. S. CURRY,
D'y U. S. Marshal.

Personally appeared before me, E. S. Curry, a lawful deputy of J. R. G. Pitkin, U. S. marshal for the eastern district of Louisiana, and makes oath that he served a true duplicate of the within writ of error on the defendant in error herein named as set forth in his official return hereon.

E. S. CURRY,
D'y U. S. Marshal.

Subscribed and sworn before me June 30, 1883.

F. A. WOOLFLEY,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

278 *Assignment of Errors.*

Supreme Court of the United States.

THE CITY OF NEW ORLEANS, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA *ex rel.* MYRA CLARK GAINES, Defendant in Error.

And now comes the City of New Orleans, by Charles F. Buck, city attorney, and J. R. Beckwith, special counsel herein, and for assignment of errors herein, say that the judge of the circuit court and said circuit court of the United States for the eastern district of Louisiana, erred herein, and that the judgment herein is erroneous for the following errors, amongst others which said errors are hereinafter assigned, viz:

1st.

That the said petition herein and said showing made by the said relator, Myra Clark Gaines, was, and is, in all things insufficient and inadequate to warrant the court in making any order thereon against the said City of New Orleans, and inadequate and insufficient to demand any response by or from the said City of New Orleans, plaintiff in error.

279 2d.

That no lawful order was made upon or concerning said petition and showing of said relator.

3d.

That no rule to show cause why a writ of alternative mandamus was made in this cause, nor was any alternative writ of mandamus ever allowed, made, or issued, or served in this cause upon which any issue could be made, or lawful issue tendered the respondent herein, said plaintiff in error.

4th.

The motion to quash the order made and entered in this cause and endorsed on the petition of relator should have been sustained and granted and not overruled.

5th.

The return of the said respondent, the City of New Orleans, to the proceeding for mandamus was in all things sufficient and complete to bar all relief by way of mandamus even in case either a rule to show cause why a writ of mandamus should not issue had
280 been laid, or an alternative writ issued, and there should have been a judgment in favor of the City of New Orleans, respondent, plaintiff in error, and against the relator, defendant in error.

6.

There was no issue of law or fact upon the said return and response of the City of New Orleans, and the sufficiency of said return stands admitted and confessed in the record herein and should have prevailed.

7.

That there being no issue of fact or law made and tendered about or concerning the matters set forth in the return of the City of New Orleans as made and filed, the court erred in allowing the relator to adduce or produce any proof or evidence.

8.

That the court after ruling that the relator could introduce evidence and proofs in this cause against the averments of the return of respondent, erred further in holding that the proceeding of relator for mandamus was a proceeding in equity not at law,
281 and in refusing for that reason a trial by jury as demanded by respondent, and in proceeding to hear the same without a jury.

9th.

The respondent, The City of New Orleans, being as averred a municipal corporation with powers to act only through its legislative department in the levy of any tax, the writ of mandamus demanded must have been directed to and laid upon each member of the council of the said city to have been effective, if lawful in any event, and the service on the mayor of the city had the proceedings been otherwise lawful and regular was not and is not sufficient and did not bring the proper and sufficient parties in interest, and it was error to allow any writ of mandamus in this cause on simple service of papers on the mayor.

10th.

That under the laws of the State of Louisiana and the powers conferred upon the council and legislative departments of the City of New Orleans the said city could not lawfully, as a voluntary act, levy or collect the tax demanded in this proceeding; and it
282 was error in the court to compel by mandamus the levy and collection of a tax which was and would have been unlawful had the same been levied by the voluntary act of the City of New Orleans or its mayor and council.

11th.

That in and by the record herein on the face thereof there should have been judgment against the relator and in favor of the plaintiff in error herein.

And the said plaintiff in error doth assign all of said matters as errors herein as well as other manifest errors to its prejudice appearing on the face of said proceedings and record, and prays this honorable court that said order, judgment, and decree of the circuit

court may be overruled and reversed, and justice done in the premises; and will ever pray, &c.

CHAS. F. BUELL, *City Att'y.*
J. R. BECKWITH,
Att'y for Pl'ff in Error.

Endorsed on cover: E. Louisiana C. C. U. S. No. 286. The City of New Orleans, appellant, *vs.* The United States *ex rel.* Myra Clark Gaines. And No. 287. The City of New Orleans, plaintiff in error, *vs.* The United States *ex rel.* Myra Clark Gaines. Filed 18th September, 1883.